DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-135	
Title:	Oxford Health Plans LLC, Petitioner v. John Ivan Sutter
Docketed:	July 31, 2012
Lower Ct:	United States Court of Appeals for the Third Circuit
Case Nos.:	(11-1773)
Decision Date:	April 4, 2012
Rehearing Denied:	April 30, 2012
Questions Presented	

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Jul 27 2012	Petition for a writ of certiorari filed. (Response due August 30, 2012)
Aug 1 2012	Waiver of right of respondent John Ivan Sutter to respond filed.
Aug 15 2012	DISTRIBUTED for Conference of September 24, 2012.
Aug 21 2012	Motion for leave to file amicus brief filed by the Chamber of Commerce of the United States of America.
Aug 29 2012	Motion for leave to file amicus brief filed by DRI - The Voice of the Defense Bar.
Sep 6 2012	Response Requested . (Due October 9, 2012)
Oct 1 2012	Order extending time to file response to petition to and including November 8, 2012.
Nov 6 2012	Order further extending time to file response to petition to and including November 15, 2012.
Nov 15 2012	Brief of respondent John Ivan Sutter in opposition filed.
Nov 20 2012	DISTRIBUTED for Conference of December 7, 2012.
Nov 20 2012	Reply of petitioner Oxford Health Plans LLC filed. (Distributed)
Dec 7 2012	Motion for leave to file amicus brief filed by the Chamber of Commerce of the United States of America GRANTED.
Dec 7 2012	Motion for leave to file amicus brief filed by DRI - The Voice of the Defense Bar GRANTED.
Dec 7 2012	Petition GRANTED.
Jan 7 2013	SET FOR ARGUMENT ON Monday, March 25, 2013
Jan 8 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Jan 9 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.

Jan 22 2013	Joint appendix filed. (Statement of costs received.)
Jan 22 2013	Brief of petitioner Oxford Health Plans LLC filed.
Jan 22 2013	Record received from U.S.C.A. for 3rd Circuit is electronic.
Jan 23 2013	Brief amicus curiae of Pacific Legal Foundation filed.
Jan 28 2013	CIRCULATED.
Jan 28 2013	Brief amicus curiae of New England Legal Foundation filed. (Distributed)
Jan 29 2013	Brief amicus curiae of DRI - The Voice of the Defense Bar filed. (Distributed)
Jan 29 2013	Brief amicus curiae of The Chamber of Commerce of the United States of America filed. (Distributed)
Jan 29 2013	Brief amicus curiae of Equal Employment Advisory Council filed. (Distributed)
Feb 21 2013	Brief of respondent John Ivan Sutter filed. (Distributed)
Feb 28 2013	Brief amici curiae of American Medical Association, et al. filed. (Distributed)
Mar 18 2013	Reply of petitioner Oxford Health Plans LLC filed. (Distributed)
Mar 25 2013	Argued. For petitioner: Seth P. Waxman, Washington, D. C. For respondent: Eric D. Katz, Roseland, N. J.

PETITION
FOR
WRIT OF
CERTIORARI

BRIEFS

No. 12-135

Supreme Court, U.S.
FILED
JUL 27 2012
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OXFORD HEALTH PLANS LLC,
Petitioner,

v.

JOHN IVAN SUTTER, M.D.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Stolt-Nielsen* v. *AnimalFeeds International Corp.*, 130 S. Ct. 1758, 1776 (2010), this Court made clear that "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to arbitration." In this case, an arbitrator concluded that the parties affirmatively consented to class arbitration on the basis of a contract provision stating: "No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration." The question presented is:

Whether an arbitrator acts within his powers under the Federal Arbitration Act (as the Second and Third Circuits have held) or exceeds those powers (as the Fifth Circuit has held) by determining that parties affirmatively "*agreed to authorize* class arbitration," *Stolt-Nielsen*, 130 S. Ct. at 1776, based solely on their use of broad contractual language precluding litigation and requiring arbitration of any dispute arising under their contract.

CORPORATE DISCLOSURE STATEMENT

Oxford Health Plans LLC is a wholly-owned subsidiary of UnitedHealth Group Incorporated, a publicly held company. No publicly held company owns 10% or more of UnitedHealth Group Incorporated's stock.

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IN THE

Supreme Court of the United States

No. 12-

OXFORD HEALTH PLANS LLC,

Petitioner,

v.

JOHN IVAN SUTTER, M.D.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Oxford Health Plans LLC respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-18a) is reported at 675 F.3d 215. The opinion of the district court (App. 19a-30a) is unpublished, but is available at 2011 WL 734933. The opinion of the arbitrator (App. 31a-53a) is unreported. A prior opinion of the court of appeals (App. 55a-59a) is unpublished, but is available at 227 F. App'x 135. Prior opinions of the district court (App. 61a-77a) and the arbitrator (App. 79a-85a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 3, 2012. A petition for rehearing en banc was denied on April 30, 2012. App. 87a-88a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sections 9 and 10 of the Federal Arbitration Act, 9 U.S.C. §§ 9 and 10, are reprinted at App. 89a-90a.

INTRODUCTION

In *Stolt-Nielsen* v. *AnimalFeeds International Corp.*, 130 S. Ct. 1758, 1775 (2010), this Court held that, under the Federal Arbitration Act, "a party may not be compelled ... to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." The Court did not address what "contractual basis" would suffice. *Id.* at 1776 n.10. It made clear, however, that "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Id.* at 1775. Rather, arbitrators and courts must demand proof that parties affirmatively "*agreed to authorize* class arbitration." *Id.* at 1776.

The next year, in *AT&T Mobility* v. *Concepcion*, 131 S. Ct. 1740, 1750-1752 (2011), the Court again explained how any shift from bilateral to class arbitration fundamentally alters the arbitration process, including "greatly increas[ing] risks to defendants" while strictly limiting appellate review on the merits, *id.* at 1752. Indeed, the Court observed that it was "hard to believe" that defendants would ever agree to class arbitration, thus "bet[ting] the company with no effective means of review." *Id.*

Stolt-Nielsen and *Concepcion* together made clear that arbitrators who order class arbitration without a sufficient contractual basis have "exceeded their powers" in a way that requires judicial vacatur under Section 10(a)(4) of the Act. 9 U.S.C. § 10(a)(4); *see Stolt-Nielsen*, 130 S. Ct. at 1767-1768. Since then, however, courts of appeals have expressly disagreed about the scope of that judicial review. In this case, the Third Circuit joined a divided panel of the Second Circuit in requiring courts to confirm any decision in which an arbitrator has purported to ground his authority in the parties' agreement—even if he or she points to nothing more than standard language precluding litigation and requiring that "any" or "all" disputes be sent to arbitration. *See* App. 12a-18a; *Jock* v. *Sterling Jewelers Inc.*, 646 F.3d 114, 124-127 (2d Cir. 2011), *cert denied*, 132 S. Ct. 1742 (2012). These decisions give *Stolt-Nielsen* no practical effect. *See Jock*, 646 F.3d at 129 n.2 (Winter, J., dissenting) ("Given my colleagues' narrow reading of the decision ... *Stolt-Nielsen* has been rendered an insignificant precedent in this circuit.").

In contrast, the Fifth Circuit has now expressly "disagree[d] with the Second Circuit's decision in *Jock*" and the Third Circuit's decision in this case. *Reed* v. *Florida Metro. Univ., Inc.*, 681 F.3d 630, 644 n.13, 645 (5th Cir. 2012), *reh'g denied*, June 15, 2012. It instead "read[s] *Stolt-Nielsen* as requiring courts to ensure that an arbitrator has a legal basis for his class arbitration determination," which "necessarily requires some consideration of the arbitrator's award and rationale." *Id.* at 645. "Although the agreement to submit to class arbitration may be implicit, it should not be lightly inferred," *id.* at 640; and, while a court may not "substitute [its] own judgment for that of an arbitrator," it also "should not confirm" an award that lacks a sufficient "contractual or legal basis," *id.* at 646. In particular, the Fifth Circuit held that an "any dispute" clause—"a standard provision" used in many arbitration agreements to express the parties' intent to arbitrate rather than litigate their disputes—cannot provide such a basis. *Id.* at 642-643.

A party's right not to be dragooned into class arbitration proceedings that it never agreed to authorize should not depend on which federal court is asked to enforce the FAA's "basic precept that arbitration 'is a matter of consent, not coercion.'" *Stolt-Nielsen*, 130 S. Ct. at 1773. Moreover, as a practical matter, the question presented here, while important and recurrent, is frequently not litigated to an appellate conclusion because of the settlement pressure on defendants facing potential class liability in arbitration, with very limited opportunity for appellate review on the merits. The Court should take this opportunity to answer the question left open in *Stolt-Nielsen*, resolve the conflict in the circuits, and prevent the transformation of routine bilateral arbitrations into *ultra vires* class proceedings.

STATEMENT

1. Petitioner Oxford Health Plans LLC, through a subsidiary, entered into a professional services contract with respondent Dr. John Sutter in 1998. The contract's arbitration clause reads as follows:

> No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the Rules of the American Arbitration Association with one arbitrator.

App. 93a. Nothing in the agreement refers to class arbitration, and there is no parol evidence or other indication that the parties ever actually contemplated class proceedings.

In 2002, Sutter filed a complaint in New Jersey Superior Court, seeking to represent both himself and a putative class of physicians who had signed similar contracts with Oxford. App. 2a. The suit alleged breach of contract and other claims under New Jersey law. *Id.* Oxford moved to compel arbitration. The state court granted Oxford's motion to compel arbitration, leaving other issues to the arbitrator. App. 2a-3a.

2. Before the arbitrator, the parties disputed whether their contract authorized class arbitration. In September 2003—just after this Court's plurality decision in *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003)—the arbitrator decided that it did. App. 43a.

The arbitrator reasoned that the clause prohibited "any conceivable court action," instead sending "all such disputes" to arbitration. App. 47a. He concluded that the "intent of the clause, read as a whole" was "to vest in the arbitration process everything that is prohibited from the court process." *Id.* Because "[a] class action is plainly one of the possible forms of civil action that could be brought in a court," "the arbitration clause must have been intended to authorize class actions in arbitration." App. 48a.[1] Moreover, in the arbitrator's view, the chief defect of Oxford's reading was that it would effectively prohibit the claimant from bringing a class action in any forum—a result he thought so "bizarre" that it would have to be stated expressly in the contract to be accepted. *Id.*[2]

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[1] The arbitrator did not address the fact that what the clause bars is civil actions "*concerning* any *dispute*," while what it directs to arbitration is "all such *disputes*"—not all "civil action[s]" that might "concern[]" such disputes. *See* App. 93a (emphasis added).

In March 2005, the arbitrator certified a plaintiff class, which Dr. Sutter asserts includes as many as 20,000 physicians. *See* App. 81a-85a. Under the AAA's Supplementary Rules for Class Arbitrations (issued shortly after the initial clause construction ruling), the certification ruling was set out in a partial final "class determination" award, which attached and incorporated the arbitrator's original "clause construction" award. *See* App. 79a, 85a. Oxford asked the United States District Court for the District of New Jersey to vacate both rulings, as contemplated by Rule 5 of the supplementary rules. *See* App. 97a-98a. The court denied the motion to vacate. App. 61a. An appeal was taken challenging the class certification award (but not the underlying clause construction) and the court of appeals affirmed. App. 55a-59a. The arbitration has since proceeded on a class basis, with a final award not likely until sometime in 2014.[3]

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[2] The arbitrator suggested that "since Oxford successfully invoked the arbitration clause to prohibit a class action in court, it ought to be bound by judicial estoppel" not to argue against the maintenance of a class arbitration. App. 48a.

[3] Dr. Sutter's counsel requested bifurcation of the proceeding into phases addressing different types of claims. Hearing of the Phase I claims before the arbitrator is likely to commence in early 2013. The current proposed schedule for Phase II contemplates expert discovery through October 2013, suggesting a hearing beginning sometime in 2014. The parties have agreed that the arbitrator's final award will not be entered until after his ruling on the Phase II claims.

3. In April 2010, this Court decided *Stolt-Nielsen S.A.* v. *AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010). There, the parties to a commercial contract contested whether or not their broad arbitration clause should be construed to permit class arbitration, while "stipulat[ing]" that they had never reached any actual agreement on that issue. *See* 130 S. Ct. at 1766, 1768-1770 & nn.6-7. An arbitration panel concluded that the clause should be interpreted to permit class proceedings—reasoning, for example, that the evidence did not prove an intent to *preclude* class arbitration, and that the defendants' position "would leave 'no basis for a class action'" at all. *Id.* at 1766, 1769 n.7; *compare* App. 48a. This Court set aside the ruling as inconsistent with the FAA.

This Court fully recognized the "high hurdle" faced by a party seeking vacatur of an arbitrator's decision, 130 S. Ct. at 1767, and that "the interpretation of an arbitration agreement is generally a matter of state law," *id.* at 1773. The Court also made clear, however, that "the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'" *Id.* From that principle, "it follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 1775; *see also id.* at 1776 ("[C]onsistent with our precedents emphasizing the consensual basis of arbitration, we see the question as being whether the parties *agreed to authorize* class arbitration."). Moreover, the Court explained:

> An implicit agreement to authorize class-action arbitration ... is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate. This is so because class-

> action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.

Id. at 1775.

In the case before it, the Court reasoned, the parties agreed that they had never reached any actual agreement with respect to class arbitration. *E.g.*, 130 S. Ct. at 1766, 1770, 1776. Accordingly, the Court had "no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration." *Id.* at 1776 n.10. In the conceded absence of any actual agreement, neither party could be "compelled to submit the[] dispute to class arbitration." *Id.* at 1776.

4. In light of *Stolt-Nielsen*, Oxford asked the arbitrator to reconsider his initial clause construction award. App. 4a. In an order dated July 6, 2010, attaching and incorporating the initial award, the arbitrator considered *Stolt-Nielsen* but adhered to his original decision. App. 31a-32a.

In the arbitrator's view, "the crucial fact in *Stolt-Nielsen* was the parties' stipulation that the arbitration award was silent with respect to class arbitration." App. 37a. Because there had been "no meeting of the minds on that point and hence no agreement," there was "nothing of the parties' intent for the arbitrators to discover and enforce." *Id.* This case, the arbitrator maintained, "could not be more different," because he had engaged in "a vital exercise to determine what the parties intended by the[ir arbitration] clause regarding class arbitration." App. 38a.

Quoting the language of the clause—"No civil action concerning any dispute arising under this agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration"—the arbitrator concluded that a class action could proceed in arbitration because "a class action is a form of civil action." App. 38a-39a. Because the clause prohibits bringing a class action in court, while directing all "disputes" under the agreement to arbitration, he reasoned that those "disputes" must include "the entire universe of actions that could possibly have been brought in any court, necessarily including class actions." App. 41a. He concluded that "the parties' intent to have class arbitration [was] clear," App. 42a, because "the text of the clause itself authorizes, indeed requires, class-action arbitration," App. 39a.

The arbitrator further sought to distinguish *Stolt-Nielsen* on the ground that the arbitrators there exceeded their powers by construing an arbitration clause to permit class proceedings "essentially for reasons of public policy." App. 35a; *see Stolt-Nielsen*, 130 S. Ct. at 1768-1770. He maintained that in this case he was always "concerned solely with the parties' intent as evidenced by the words of the arbitration clause itself." App. 35a.[4] He continued, however, to stress his point that if class arbitration were not available, Dr. Sutter would not be able to maintain any class action at all. *See* App. 41a-42a. That outcome, which the arbitrator had previously called "bizarre" (App. 48a), was one he remained unwilling to entertain. *See, e.g.*, App. 41a ("[I]f the clause cannot permit Dr. Sutter's court class action to go to arbitration, then Dr. Sutter's original class action must be outside of the arbitration agreement altogether[,] ... and the court class action should be reinstated.").

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[4] The arbitrator retreated from his previous reliance on the lack of any specific exclusion of class arbitration, conceding that such reasoning "would run afoul of *Stolt-Nielsen*." App. 39a. He now suggested that "[t]he absence of such an exclusion ... merely corroborated what was already obvious from the language of the clause itself." *Id.*

5. Oxford asked the district court to vacate the arbitrator's reconsidered clause construction award under Section 10 of the FAA, 9 U.S.C. § 10.[5] In February 2011, the court denied Oxford's motion and granted Sutter's cross-motion to confirm the award. App. 19a-20a. In reaching that conclusion, the court stressed the "highly deferential standard of review under the FAA." App. 27a. Noting that this Court in *Stolt-Nielsen* "expressly declined 'to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration,'" the court reasoned that the arbitrator had "concluded that the contractual basis between these parties, i.e. their arbitration agreement, clearly and unambiguously expressed their intent to authorize class action arbitration.'" App. 28a. Thus, the award would be confirmed because the arbitrator's decision "suggests that [he] performed the appropriate function of an arbitrator under the FAA after *Stolt-Nielsen*; [he] examined the parties' intent, and gave effect to the arbitration agreement." App. 28a-29a.

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[5] The district court had jurisdiction over Oxford's petition under 28 U.S.C. § 1332(a), because the parties are of diverse citizenship and the amount in controversy exceeds $75,000. *See* App. 5a, 23a.

6. The court of appeals affirmed. App. 1a-2a.[6] The court acknowledged that, under *Stolt-Nielsen*, "[a]n arbitrator may exceed his powers by ordering class arbitration ... unless there is a contractual basis for concluding that the parties agreed to that procedure." App. 8a; *see also* App. 8a-12a. It rejected, however, Oxford's contention that the arbitration clause at issue in this case is just as "silent" as the clause at issue in *Stolt-Nielsen*. App. 13a. In this case, the court reasoned, "[n]o stipulation between Oxford and Sutter is conclusive of the parties' intent." App. 13a. Instead, the arbitrator had purported to discern such an intent in the language of the agreement and thus "articulate[d] a contractual basis for his decision." App. 14a; *see also* App. 15a ("Without a conclusive statement of the parties' intent or clear evidence of arbitral overreaching, we must conclude that the arbitrator ... endeavored to give effect to the parties' intent.").

In reaching that conclusion, the court summarized the arbitrator's textual analysis:

> He reasoned that the clause's first phrase, "No civil action concerning any dispute arising under this Agreement shall be instituted before any court," is broad enough to include class actions. Thus, its second phrase, "and all such disputes shall be submitted to final and binding arbitration ...," sends all conceivable civil actions—including class actions—to arbitration. In other words, the phrase "no civil action ... shall be instituted in any court" meant that a

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[6] The court of appeals had jurisdiction over Oxford's appeal from the district court's order confirming the arbitrator's decision under 9 U.S.C. § 16(a)(1)(D) and (a)(3). *See* App. 5a.

> class action may not be instituted in a court of law. "All such disputes" must go to arbitration.

App. 14a.

The court accepted that reasoning as sufficient to establish contractual "intent" for purposes of *Stolt-Nielsen*. App. 14a-17a. It rejected Oxford's arguments that the parties had never reached any actual agreement as to class arbitration and "that the arbitrator improperly inferred the parties' intent to authorize class arbitration from the breadth of the parties' arbitration agreement and from its failure to preclude class arbitration." App. 16a. All these, the court reasoned, were "simply dressed-up arguments that the arbitrator interpreted [the] agreement erroneously." App. 15a.

Thus, the court of appeals refused to undertake or require any independent review of the "contractual basis" asserted by the arbitrator in response to the question required by the FAA and *Stolt-Nielsen*: whether the parties ever actually "*agreed to authorize* class arbitration." 130 S. Ct. at 1776 & n.10. Rather, the court declared the FAA's "basic precept" that arbitration is "'a matter of consent, not coercion,'" *id.* at 1773, satisfied here because the arbitrator purported to have discerned "the parties' intent" and "articulate[d] a contractual basis for his decision" that the court deemed not "totally irrational." App. 14a, 17a. In the court's view, "[n]othing more is required under § 10(a)(4) of the Federal Arbitration Act." App. 17a.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE DIVIDED OVER THE "CONTRACTUAL BASIS" QUESTION LEFT OPEN IN *STOLT-NIELSEN*

The courts of appeals are now expressly divided on the question left open in *Stolt-Nielsen*: "[W]hat contractual basis may support a finding that the parties agreed to authorize class-action arbitration"? 130 S. Ct. at 1776 n.10. The Second and Third Circuits give arbitrators effectively unfettered discretion to impose class proceedings so long as the arbitrator purports to find an implicit "agreement" in the language of the parties' contract—even where that language says nothing more than that the parties will resolve all disputes through arbitration, not litigation. In contrast, the Fifth Circuit recognizes that *Stolt-Nielsen* requires a court applying the FAA to provide meaningful review of an arbitrator's reasoning, to ensure that there is a true contractual basis for compelling class proceedings—*not* including a mere broad arbitration provision. That conflict calls for review by this Court.

a. In *Jock* v. *Sterling Jewelers Inc.*, 646 F.3d 114 (2d Cir. 2011), *cert denied*, 132 S. Ct. 1742 (2012), a divided panel of the Second Circuit sustained an arbitrator's determination that a contract implicitly authorized class arbitration. The agreement made no mention of class claims. *Id.* at 117.[7] In deciding to impose class ar-

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[7] The agreement provided:

> I hereby utilize the Sterling RESOLVE program to pursue any [employment] dispute, claim, or controversy ("claim") against Sterling .... I understand that by signing this Agreement I am waiving my right to obtain legal or equitable relief (e.g., monetary, injunctive or reinstatement) through any government agency or court,

bitration over the defendant's objection, the arbitrator (i) "construed the absence of an express prohibition on class claims against the contract's drafter, Sterling"; (ii) reasoned that the agreement's conferral of power to award any type of *relief* available in a court meant that the employee could not have waived the right to participate in a collective action; and (iii) concluded that the agreement could not be construed to *prohibit* class arbitration, "which thus permitted the plaintiffs to proceed" to seek class certification. *Id.*; *see also id.* at 126-127 (discussing "all remedies" aspect of arbitrator's reasoning). The district court initially sustained the arbitrator's decision, but after this Court's decision in *Stolt-Nielsen* that court reversed itself and vacated the arbitrator's award. *See id.* at 117-118.

The Second Circuit reversed. Emphasizing that the plaintiffs in the case had not, as in *Stolt-Nielsen*, "stipulat[ed] that the parties had reached no agreement on the issue," *id.* at 123, the court held that judicial review was limited to verifying "that the issue of whether the agreement permitted class arbitration was squarely presented to the arbitrator," *id.* at 124. If the issue was submitted to the arbitrator and she purported to be construing the parties' agreement, any degree of inquiry into the plausibility of her construction exceeded

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> and I am also waiving my right to commence any court action. I may, however, seek and be awarded equal remedy through the RESOLVE program. ... The Arbitrator shall have the power to award any types of legal or equitable relief that would be available in a court of competent jurisdiction including, but not limited to, the costs of arbitration, attorney fees and punitive damages for causes of action when such damages are available under law.

646 F.3d at 116-117 (quoting agreement).

the scope of judicial review permitted by the FAA. *See id.* ("[I]t is not for the district court to decide whether the arbitrator 'got it right[.]'"); *id.* at 127 ("Regardless, whether the arbitrator was right or wrong in her analysis, she had the authority to make the decision, and the parties to the arbitration are bound by it.").

In dissent, Judge Winter criticized the panel majority for failing to give due consideration to *Stolt-Nielsen*, "a binding precedent on all fours." 646 F.3d at 128 (Winter, J., dissenting). The full court denied a petition for rehearing en banc.

b. In the decision below, the Third Circuit joined the Second in holding that, under *Stolt-Nielsen*, arbitrators have essentially unconstrained discretion to "interpret" routine bilateral arbitration clauses to authorize class arbitration. *E.g.*, App. 13a-18a.

As explained above, the arbitrator in this case principally reasoned that the parties must have affirmatively "intended" to authorize class arbitration (App. 45a-48a) because their arbitration clause barred any "civil action concerning any dispute" in court, instead directing "all such *disputes*" to arbitration, App. 93a (emphasis added). The arbitrator also found no "clear manifestation" of any intent to *preclude* class arbitration (App. 48a), and thought that any construction under which "class actions are not possible in any forum" would be "bizarre," *id.* On reconsideration after *Stolt-Nielsen*, he added that there was no post-dispute "stipulation" that the parties never had any actual "meeting of [the] minds" on the question of class arbitration. App. 37a.

In sustaining this analysis, the court of appeals, like the Second Circuit in *Jock*, ruled that the arbitrator's "decision to order class arbitration is within his authority so long as it stands on a contractual basis," App. 14a—and that any "contractual basis" the arbitrator "articulate[s]" (*id.*) must be accepted unless the court is prepared to declare it "totally irrational," App. 17a. The court, too, distinguished *Stolt-Nielsen* on the ground that there was no post-dispute "stipulation" that the parties never reached any actual agreement at all about class proceedings. App. 13a-14a. That circumstance, the court held, left the arbitrator "not constrained" in ascertaining the parties' "intent." App. 13a.

c. In sharp contrast, the Fifth Circuit has recognized that, under *Stolt-Nielsen*, a court reviewing a motion to vacate or confirm under the FAA must meaningfully review an arbitrator's purported "contractual basis" for imposing class arbitration. *Reed* v. *Florida Metro. Univ., Inc.*, 681 F.3d 630, 646 (5th Cir. 2012), *reh'g denied*, June 15, 2012. And unlike the Second and Third Circuits, the Fifth Circuit has held that a broad arbitration clause cannot, by itself, establish the parties' agreement to authorize class proceedings. *Id.* at 642-643.

In *Reed*, as in this case and in *Jock*, an arbitrator determined that the parties implicitly agreed to class arbitration. In particular, he pointed to two provisions of the parties' agreement. One, as in this case, precluded "any lawsuit" between the parties and required arbitration of "'any dispute ..., no matter how described, pleaded or styled.'" 681 F.3d at 641. The second, as in *Jock*, provided that "'[a]ny remedy available from a court under the law shall be available in the arbitration.'" *Id.*[8] Also as in this case, the arbitrator noted that without an arbitration clause the defendant "'would have clearly been required to submit to a class action lawsuit.'" *Id.* at 641-642. Finally, he "relied upon the [defendant's] failure to expressly ban class arbitration" in an agreement that it had drafted. *Id.* at 642. On these grounds, the arbitrator concluded that the defendant had implicitly agreed to class arbitration. *See id.* at 641.

When reviewing the arbitrator's decision, the court of appeals fully acknowledged the limited nature of FAA review, *id.* at 636-638; that the arbitrator purported to construe the parties' agreement, *id.* at 641-642; and that the parties "did not stipulate that their agreement was silent on class arbitration," *id.* at 642. Nonetheless, the court ruled that the arbitrator exceeded his authority "by ordering the parties into class arbitration without a sufficient basis for concluding that the parties agreed to resolve their dispute in this manner." *Id.*

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[8] The agreement provided:

> The student agrees that any dispute arising from my enrollment ... no matter how described, pleaded or styled, shall be resolved by binding arbitration....
>
> 1. Both student and Everest University irrevocably agree that any dispute between them shall be submitted to Arbitration.
>
> 2. Neither the student nor Everest University shall file or maintain any lawsuit in any court against the other, and agree that any suit filed in violation of this Agreement shall be dismissed by the court in favor of an arbitration conducted pursuant to this Agreement.
>
> ...
>
> 5. Any remedy available from a court under the law shall be available in the arbitration.

Reed, 681 F.3d at 632-633.

The Fifth Circuit noted that, even on FAA review, an arbitrator's purported interpretation of an arbitration agreement "'must, in some logical way, be derived from the wording or purpose of the contract.'" 681 F.3d at 637 n.8. It also recognized this Court's particular teaching in *Stolt-Nielsen* and *Concepcion* of the significant disadvantages of class arbitration, which indicate that while an "agreement to submit to class arbitration may be implicit, it should not be lightly inferred." *Id.* at 640; *see also id.* at 640 n.10. Reviewing the arbitrator's decision in light of those principles, the court concluded that "[n]one of the provisions the arbitrator identified ... even remotely relates to or authorizes class arbitration." *Id.* at 642.

In particular, the Fifth Circuit rejected reliance on the "any dispute" clause. 681 F.3d at 642-643. That language, the court stressed, was "a standard provision that may be found, in one form or another, in many arbitration agreements" and "merely reflects an agreement between the parties to arbitrate their disputes." *Id.* at 642. Reliance on the "any remedy" provision was likewise "improper," because "while a class action may lead to certain types of remedies or relief, a class action is not *itself* a remedy," and thus the existence of such a clause "says nothing whatsoever about class arbitration." *Id.* at 643. The arbitrator's observation that class actions would have been available in court was at best beside the point, because "the central purpose of the arbitration agreement is to *avoid* such provisions of state law, not to incorporate them"; and, in any event, the availability of class actions in the *absence* of an arbitration agreement "is not a sufficient basis to conclude that [the parties] agreed to class arbitration when they entered into an arbitration agreement." *Id.* Finally, any suggestion that class arbitration could be imposed because the defendant had failed to include an express exclusion in the parties' agreement was "directly contrary" to *Stolt-Nielsen*, which "requires that the parties 'agree[] to authorize' class arbitration, not merely that they fail to bar such a proceeding." *Id.* at 644 (quoting *Stolt-Nielsen*, 130 S. Ct. at 1776; alterations in *Reed*).

The Fifth Circuit recognized that its analysis could not be squared with *Jock* or the decision in this case. 681 F.3d at 644-646 & n.13. After describing *Jock*, the court "respectfully disagree[d] with the Second Circuit's decision," *id.* at 645:

> We read *Stolt-Nielsen* as requiring courts to ensure that an arbitrator has a legal basis for his class arbitration determination, even while applying the appropriately deferential standard of review. 130 S. Ct. at 1775. Such an analysis necessarily requires some consideration of the arbitrator's award and rationale. ... To the extent that the Second Circuit decided not to undertake an inquiry into the arbitrator's reasoning, we must part ways.
>
> Nor can we agree that the deferential standard of review applicable to arbitration awards precludes such an inquiry. Indeed, the same standard of review was at issue in *Stolt–Nielsen*, but it did not prevent the Court from examining and vacating the arbitrator's award.

Id. at 645-646. The court "disagree[d] with *Sutter* for essentially the [same] reasons." *Id.* at 644 n.13.

d. There is now a firm and acknowledged conflict among the courts of appeals as to the proper judicial treatment of an arbitrator's determination that there is a sufficient "contractual basis" for imposing class arbitration. In the Second and Third Circuits, an arbitrator may impose class arbitration based on any broad arbitration agreement, and courts must sustain that determination so long as the arbitrator purports to be "divining the parties' intent," *Jock*, 646 F.3d at 126.[9] In the Fifth Circuit, on the other hand, an arbitrator's construction will be subject to deferential but meaningful review, and parties will not be compelled to submit to class arbitration without a real "contractual basis" for concluding they agreed to do so—*not* including their having used routine, broad arbitration language. *See Stolt-Nielsen*, 130 S. Ct. at 1775. Only one of these positions can be correct. The Court should grant review to ensure nationwide uniformity in application of its arbitration precedents and the FAA.

II. THE DECISION BELOW IS INCORRECT AND WARRANTS FURTHER REVIEW IN THIS CASE

In *Stolt-Nielsen*, this Court observed that "[w]hile the interpretation of an arbitration agreement is generally a matter of state law, the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'" 130 S. Ct. at 1773 (citations omitted). The following year, in *AT&T Mobility* v. *Concepcion*, 131 S. Ct. 1740, 1750 (2011), the Court reiterated that imposing *class* arbitration without a true contractual basis violates that precept, because "the 'changes brought about by the shift from bilateral arbitration to class-action arbitration' are 'fundamental,'" including involving "absent parties, necessitating additional and different procedures and involving higher stakes." *See also id.* at 1750-1753. Entertaining class claims "makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 1751. It remains uncertain whether class arbitration can either protect the rights of absent class members or bind them as to matters resolved in favor of the defendant. *See id.* at 1751. On the other hand, it is clear that class proceedings "greatly increase[] risks to defendants," while essentially eliminating appellate review of errors of fact and law. *Id.* at 1752.

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[9] In a recent decision, the First Circuit affirmed a district court's conclusion that the parties to a set of commercial contracts had agreed to have their arbitrators decide whether certain of the contracts permitted a particular sort of associational arbitration. *Fantastic Sam's Franchise Corp.* v. *FSRO Ass'n Ltd.*, 683 F.3d 18, 22 (1st Cir. 2012). In reaching that decision, the court cited *Jock* and *Sutter* in rejecting the proposition "that there must be express contractual language evincing the parties' intent to permit class or collective arbitration." *Id.*

For all these reasons, the Court has framed the question on FAA review as "whether the parties *agreed to authorize* class arbitration," *Stolt-Nielsen*, 130 S. Ct. at 1776—and has expressed frank skepticism that any defendant ever *would* agree to "bet the company with no effective means of review," *Concepcion*, 131 S. Ct. at 1752. Yet, the Second and Third Circuits have embraced an approach to FAA review that gives arbitrators essentially unreviewable discretion to impose class arbitration on the basis of any broad arbitration clause. That approach undermines the basic premises of FAA arbitration, strips *Stolt-Nielsen* of continuing significance, and warrants further review in this case.

A. Undue Deference To An Arbitrator's Assertion Of Authority To Impose Class Proceedings Improperly Limits FAA Review

Under the decision below and the Second Circuit's decision in *Jock*, an arbitrator has unreviewable discretion to impose class proceedings so long as he or she purports to construe the parties' contract and "divine" their contractual "intent." *See* pp. 13-16, *supra*. As the Fifth Circuit has recognized, that approach cannot be reconciled with the promise of the FAA—and the holding of *Stolt-Nielsen*—that courts will intervene when an arbitrator has "exceeded [his] powers," asserting authority far beyond that fairly conferred by the parties' agreement. 9 U.S.C. § 10(a)(4); *see Reed*, 681 F.3d at 645.

This case is a good example. The parties signed their professional services contract, including a broad arbitration clause, in 1998—before most parties would reasonably have entertained any notion of class arbitration. *Cf. Stolt-Nielsen*, 130 S. Ct. at 1768 n.4 (noting testimony that class arbitrations were uncommon before this Court's decision in *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003), and the ensuing adoption of the AAA's supplementary rules). Nothing in their agreement even hints at the possibility of class proceedings. App. 93a-94a (reprinting clause).

The arbitrator asserted that a clause barring any "civil action concerning any dispute ... before any court" and referring "all such disputes" to arbitration "must have been intended to authorize class actions in arbitration," because "[a] class action is plainly one of the possible forms of civil action." App. 48a; *see also* App. 14a. That contention cannot survive even cursory analysis. The clause requires arbitration of "all such *disputes,*" not all such *actions*. And it is simply perverse to conclude that parties who comprehensively barred court litigation and required arbitration "must have intended" to commit themselves to the possibility of extended, uncertain, costly, and high-stakes class proceedings. *Compare Concepcion*, 131 S. Ct. at 1753 (class arbitration "is not arbitration as envisioned by the FAA"); *Reed*, 681 F.3d at 643 ("[T]he central purpose of the arbitration agreement is to *avoid* ... provisions [such as a state statute permitting certain class actions], not to incorporate them into the arbitration agreement."). Indeed, under the arbitrator's reasoning, it is the parties who strive hardest to avoid the expense, inefficiency, and delay of litigation who are most likely to be saddled with a complex, protracted, and risky class arbitration. That result makes no sense.

The arbitrator's "interpretation" of the contract did not purport to rest on any background rule of law from which contractual consent to class proceedings might be inferred. *See Stolt-Nielsen*, 130 S. Ct. at 1768-1769 (noting possibility of an applicable "'default rule' under which an arbitration clause is construed as allowing class arbitration in the absence of express consent"); *Reed*, 681 F.3d at 641, 642 & n.12; *cf. Bazzle*, 539 U.S. at 447 (plurality opinion) (Court granted review to determine whether such a state default rule would be consistent with the FAA, but did not reach that question). Nor could it have. In 1998, no rule of New Jersey law authorized class proceedings where the parties to an arbitration agreement had not spoken to the issue; and the prevailing federal rule was that the FAA "forbids federal judges from ordering class arbitration where the parties' arbitration agreement is silent on the matter." *Champ* v. *Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995); *see, e.g.*, *Stolt-Nielsen*, 130 S. Ct. at 1771 (describing conflict between *Champ* rule and state-law decisions in California and South Carolina that this Court did not resolve in *Bazzle*).[10]

In short, there is no sustainable basis for concluding that the arbitration clause in this case reveals any actual agreement or intent to authorize class arbitration. The arbitrator's contrary ruling is best explained as a *post hoc* rationalization for a result clearly based in fact on the policy preference revealed by the arbitrator's original decision: avoiding the "bizarre result" that Dr. Sutter might not be able to pursue his contract claims against Oxford on a class basis "in any forum." App. 48a. There is nothing "bizarre" about that result unless one concludes, as the arbitrator implicitly did, that all dispute resolution *must* include the right to bring claims on behalf of a class.

Of course, as *Stolt-Nielsen* makes clear, the FAA forbids precisely that sort of assertion of arbitral power to impose class procedures based on the arbitrator's view that they should be available as a policy matter. *E.g.*, 130 S. Ct. at 1767-1770. Such a decision cannot be squared with "the central or 'primary' purpose of the FAA ... to ensure that 'private agreements to arbitrate are enforced according to their terms.'" *Id.* at 1773. Yet, the Third Circuit refused to examine the merits of the arbitrator's ruling here, beyond asserting that it was not "totally irrational" for him to claim to have interpreted the parties' agreement and divined a mutual "intent" to authorize class proceedings. App. 17a. To hold, as the court of appeals has, that "[n]othing more is required under § 10(a)(4) of the Federal Arbitration Act" is not appropriate deference to an arbitrator's resolution of some arguable contractual question. It is an abdication of the judicial responsibility to vacate awards when arbitrators have "exceeded their powers." 9 U.S.C. § 10(a)(4).

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[10] In the Third Circuit, see *Johnson* v. *West Suburban Bank*, 225 F.3d 366, 377 n.4 (3d Cir. 2000) ("This court has never addressed the question whether class actions can be pursued in arbitral forums, though it appears impossible to do so unless the arbitration agreement contemplates such a procedure." (citing *Champ*)). Under general New Jersey contract law, "[t]he law will not ... supply a term or condition with respect to which [a contract] is silent." *See, e.g., Crewe Corp.* v. *Feiler*, 49 N.J. Super. 532, 543 (App. Div. 1958), *rev'd on other grounds*, 28 N.J. 316 (1958).

In his dissent in *Jock*, Judge Winter observed that his colleagues' unduly restrictive approach to review of arbitrators' decisions with respect to the authorization of class arbitration has rendered *Stolt-Nielsen* "an insignificant precedent" in the Second Circuit. 646 F.3d at 129 n.2 (Winter, J., dissenting).[11] That observation has already been borne out. A recent decision from the Southern District of New York, for example, sustained an arbitrator's imposition of class proceedings even though the court agreed that, at the time of contracting, "neither party expressly contemplated the issue of class arbitration." *Rame, LLC* v. *Popovich*, No. 12-

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[11] *See also Reed Elsevier, Inc.* v. *Crockett*, No. 3:10cv248, 2012 WL 604306, at *13 n.17 (S.D. Ohio Feb. 24, 2012) (deeming it "inappropriate to limit or to distinguish Stolt–Nielsen" as in *Jock* and endorsing Judge Winter's dissent as "well reasoned and faithful to Supreme Court authority"). The district court in *Jock* likewise held that the arbitrator's order imposing class arbitration had to be vacated "in light of *Stolt-Nielsen*'s essential holding," *Jock* v. *Sterling Jewelers, Inc.*, 725 F. Supp. 2d 444, 450 (S.D.N.Y. 2010), because "plaintiffs ... fail[ed] to identify any concrete basis in the record for the arbitrator to conclude that the parties manifested an intent to arbitrate class claims," *id.* at 449.

1684, 2012 WL 2719159, at *9 (S.D.N.Y. July 9, 2012). "Post-*Jock*," the court observed, before a court may enforce *Stolt-Nielsen*'s prohibition on inferring consent from contractual silence, the disputing parties "must be in agreement regarding their intent and also stipulate that there was 'no explicit or implicit intent to submit to class arbitration.'" *Id.* (quoting *Jock*, 646 F.3d at 120). Surely, however, no well-advised party will ever again make such a post-dispute "stipulation." Thus, in the Second Circuit, the FAA's requirement that there be an actual agreement to authorize class proceedings is now unenforceable whenever an arbitrator purports to have "'look[ed] to state law principles of contract interpretation in order to divine whether such intent exists.'" *Id.* (quoting *Jock*, 646 F.3d at 126). And the same is now true in the Third Circuit as well.

In recent years, this Court has clearly and repeatedly taught that class arbitration "is not arbitration as envisioned by the FAA," *Concepcion*, 131 S. Ct. at 1753; that an arbitrator "exceed[s his] power under § 10(a)(4) of the FAA by imposing class procedures" without a proper contractual mandate, *id.* at 1750; and that an arbitration agreement that is "silent on the question of class procedures[] [may] not be interpreted to allow them because the 'changes brought about by the shift from bilateral arbitration to class-action arbitration' are 'fundamental,'" *id.* (quoting *Stolt-Nielsen*, 130 S. Ct. at 1776). Those teachings are too important to allow the courts of appeals to render them merely hortatory by refusing to provide meaningful review.

B. The Question Presented Is Important, Recurring, And Ripe For Review

The question whether a court applying Section 10 of the FAA will meaningfully review arbitral awards finding a contractual basis for imposing class arbitration is one of significant importance. For parties to view arbitration as a desirable alternative to litigation, they must be confident that courts will not allow arbitrators to arrogate to themselves the power to impose "fundamental changes" in the normal arbitration model without a real basis in the parties' own agreement. *See Stolt-Nielsen*, 130 S. Ct. at 1776 & n.10; *Concepcion*, 131 S. Ct. at 1750-1753. A primary protection against that risk is the ability to obtain judicial review under Section 10(a)(4) when arbitrators have "exceeded their powers." If courts refuse to discharge that duty, their dereliction will undermine—not reinforce—the longstanding federal policy favoring arbitration.[12]

The question presented is also widely recurrent. In addition to *Jock*, *Reed*, and the decision below, at least five district courts have squarely addressed the issue.[13]

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[12] *See, e.g.*, *Solvay Pharm., Inc.* v. *Duramed Pharm., Inc.*, 442 F.3d 471, 475-476 (6th Cir. 2006) ("[P]eriodic judicial intervention [under Section 10(a)(4)] promotes arbitration in the long run. More parties will contract for arbitration if they can tailor arbitration to their particular needs; and fewer will opt for arbitration if they cannot.").

[13] *See, e.g.*, *Rame*, 2012 WL 2719159; *Southern Commc'ns Servs., Inc.* v. *Thomas*, 829 F. Supp. 2d 1324, 1340 (N.D. Ga. 2011) ("[The arbitrator] identified contract law principles in order to determine the parties' intent. Therefore, the arbitrator did not exceed his power."), *appeal pending*, No. 11-15587 (11th Cir.); *Amerix Corp.* v. *Jones*, No. 11-2844, 2012 WL 141150, at *6 (D. Md. Jan. 17, 2012) ("Rather than interpret *Stolt-Nielsen* as holding that courts should reconsider arbitrators' decisions in class arbitration proceedings, as plaintiffs contend, courts seem to read *Stolt-Nielsen* as underscoring the pre-existing deference to arbitrators' decisions as long as their interpretations have some basis in the parties' agreement."), *appeals being held in abeyance*, No. 12-1219 (4th Cir.); *Louisiana Healthcare Serv. Indemnity Co.* v. *Gambro*

Appeals on this question are pending in the Fourth and Eleventh Circuits and the Vermont Supreme Court.[14] As noted below, other cases presenting the issue have recently been settled. Persistent uncertainty over what sort of "contractual basis" suffices to permit imposition of class arbitration, and what degree of judicial review an arbitrator's decision on that issue will receive under the FAA, is imposing significant burdens on parties and courts—routinely taking a process that was meant to produce "lower costs, greater efficiency and speed" and making it "slower, more costly, and more likely to generate procedural morass than final judgment." *Concepcion*, 131 S. Ct. at 1751.[15]

The issue is also now ripe for review. The conflict in the circuits that has now emerged is square and acknowledged. The grounds of disagreement and lines of analysis are also clear, and unlikely to change or

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A.B., 756 F. Supp. 2d 760, 768 (W.D. La. 2010) (*Stolt-Nielsen* applicable only where arbitral panel tries "to ascertain what the best result could have been by imposing its own policy choices"); *Smith & Wollensky Restaurant Group Inc.* v. *Passow*, 831 F. Supp. 2d 390 (D. Mass. 2011) (upholding arbitrators' determination that broad arbitration clause authorized class arbitration and construing *Stolt-Nielsen* as limited to cases involving "stipulation" that agreement is silent regarding class arbitration).

[14] *Southern Commc'ns Servs.* v. *Thomas*, 11th Cir. No. 11-15587 (oral argument scheduled for August 27, 2012); *Amerix Corp.* v. *Jones*, 4th Cir. No. 12-1219 (appeals being held in abeyance pending proceedings in underlying arbitration); *Bandler* v. *Charter One Bank*, Vt. Supreme Ct. No. 2011-249 (oral argument held Mar. 27, 2012).

[15] Again, this case is a good example. Dr. Sutter's contract claim was filed in 2002. There is little doubt it would have been resolved years ago if handled, as intended, on an individual basis.

evolve significantly through further decisions in the same or other courts. And this case is an appropriate vehicle for resolving the conflict.

Moreover, as a practical matter, while the question presented is frequently recurring in the lower courts, this case may be one of the few to reach this Court. The question presented in this case is typically litigated in the courts after an arbitrator has already entered an award authorizing class arbitration—and sometimes, as here, after the arbitrator has also certified a class. Defendants in such cases face well-recognized pressures to settle rather than continue to litigate through appeal. As this Court observed in *Concepcion*, "the risk of 'in terrorem' settlements that class actions entail" is "no different" in the case of class arbitrations; "[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." 131 S. Ct. at 1752. Indeed, the pressure to settle is especially acute in arbitration, because of the very limited opportunity for further review on the merits. *See id.*

Thus, deferring review would place defendants facing demands for class arbitration in an extraordinarily difficult position, in many cases forcing them to abandon sound legal arguments because of the threat of classwide liability without effective appellate review. This is not an academic concern. In at least two recent cases, arbitration defendants in the First and Tenth Circuits pursued challenges to arbitral decisions that they had implicitly agreed to class arbitration through full briefing on appeal, but then settled before the courts heard oral argument.[16] Thus, even a significant volume of litigation in the lower courts may generate, in the end, few cases litigated through decision on appeal. The present case squarely raises an important question on which the circuits are divided. It warrants immediate review.

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[16] *See The Smith & Wollensky Group, Inc.* v. *Passow*, 1st Cir. No. 11-1179, Appellants' Br. at *6, 2011 WL 2118480 (arguing that

CONCLUSION

The petition for a writ of certiorari should be granted.

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arbitrator's decision construing agreement "to permit class or collective proceedings notwithstanding the agreement's silence on the matter, is in direct conflict with *Stolt-Nielsen*"), *appeal dismissed*, Oct. 14, 2011; *Long John Silver's, Inc.* v. *Stewart*, 10th Cir. No. 10-6249, Appellant's Br. at *21, 2011 WL 1352471 ("After *Stolt-Nielsen*, the arbitrator lacks the authority under the arbitration agreement to conduct a class arbitration."), *appeal dismissed*, Dec. 30, 2011. Doubtless there are other cases not apparent from the public record where the threat of class liability has induced defendants to settle rather than to seek judicial or appellate review of disputed clause constructions.

Respectfully submitted.

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11-1773

JOHN IVAN SUTTER, M.D.

v.

OXFORD HEALTH PLANS LLC, *Appellant.*

Argued November 17, 2011
Opinion Filed: April 3, 2012
As Amended April 4, 2012

OPINION OF THE COURT

Before: FUENTES, CHAGARES, Circuit Judges, and POGUE, Judge.*

FUENTES, Circuit Judge:

Oxford Health Plans, LLC, and Dr. John Ivan Sutter are parties to a Primary Care Physician Agreement, drafted by Oxford, which contains a broad arbitration clause. Neither the arbitration clause nor any other provision of the agreement makes express reference to class arbitration. Nevertheless, when a dispute arose regarding Oxford's alleged failure to make prompt and accurate reimbursement payments to participating physicians, an arbitrator construed the broad text of the clause to authorize class arbitration. Oxford contends that the Supreme Court's decision in *Stolt–Nielsen S.A. v. Animal-Feeds International Corp.*, — U.S. —, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010), requires vacatur of the award authorizing class arbitration. We disagree, and we will affirm the Order of the District Court denying Oxford's motion to vacate the award.

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* Hon. Donald C. Pogue, Chief Judge, United States Court of International Trade, sitting by designation.

I

By their 1998 Primary Care Physician Agreement (the "Agreement"), the parties agreed that Sutter would provide primary care health services to members of Oxford's managed care network in exchange for compensation at predetermined reimbursement rates. They also agreed to arbitrate their disputes under the Agreement by a clause that states:

> No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the Rules of the American Arbitration Association with one arbitrator.

(App. 55).

A dispute arose in April 2002, when Sutter accused Oxford of engaging in a practice of improperly denying, underpaying, and delaying reimbursement of physicians' claims for the provision of medical services. Sutter filed a complaint on behalf of himself and a class of health care providers against Oxford and other health insurers in New Jersey Superior Court, alleging breach of contract and other violations of New Jersey law. Oxford moved to compel arbitration of Sutter's claims against it under the Agreement. Sutter opposed the motion, arguing that referral of the class claims to individual arbitration would violate New Jersey public policy. He urged the Superior Court either to refuse to enforce the clause or to certify the class before sending the claims to arbitration. In October 2002, the Superior Court granted Oxford's motion to compel arbitration and ordered that all procedural issues, including those of class certification, be resolved by the arbitrator.

The parties commenced arbitration before William L.D. Barrett and submitted to him the question of whether the arbitration clause in their Agreement allows for class arbitration. By memorandum and order dated September 23, 2003, he determined that it does. Framing the question as one of contract construction, the arbitrator turned first to the text of the arbitration clause. He described the clause as "much broader even than the usual broad arbitration clause;" it was "unique in [his] experience and seem[ed] to be drafted to be as broad as can be." (App. 47). The arbitrator thus determined that the clause's first phrase, "No civil action concerning any dispute arising under this Agreement shall be instituted before any court," embraces all conceivable court actions, including class actions. Because the clause's second phrase sends "all such disputes" to arbitration, he reasoned that class disputes must also be arbitrated. Thus, the arbitrator concluded that the clause expressed the parties' intent to authorize class arbitration "on its face." (App. 48). He observed that an express carve-out for class arbitration would be required to negate this reading of the clause. He mused, however, that it would be bizarre for the parties to have intended to make class action impossible in any forum. Since he found the clause unambiguous, the arbitrator did not reach

Sutter's argument that any ambiguity in the clause should be construed against its drafter, Oxford. The arbitrator subsequently incorporated this clause construction into his Partial Final Class Determination Award, dated March 24, 2005.

In April 2005, Oxford filed a motion to vacate the award in the District Court, arguing that the arbitrator had exceeded his powers and manifestly disregarded the law by ordering class arbitration. The District Court denied Oxford's motion in October 2005, and a panel of this Court affirmed in February 2007. *Sutter v. Oxford Health Plans, LLC,* No. 05–CV–2198, 2005 U.S. Dist. LEXIS 25792 (D.N.J. Oct. 31, 2005), *aff'd* 227 Fed.Appx. 135 (3d Cir. 2007). The arbitration thereafter proceeded on a classwide basis.

This action represents Oxford's second foray into federal court to vacate the award authorizing class arbitration as in excess of the arbitrator's powers. Since Oxford's first unsuccessful attempt at vacatur, the Supreme Court decided *Stolt–Nielsen S.A. v. AnimalFeeds International Corp.,* — U.S. —, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010), in which it held that an arbitral panel had exceeded its authority by allowing class arbitration when the parties had reached no agreement on the issue. *See id.* at 1775. Oxford contends that *Stolt–Nielsen* controls this case and compels the conclusion that the arbitrator's construction of the clause was in excess of his powers. Oxford first moved the arbitrator for reconsideration of his clause construction award, but the arbitrator distinguished *Stolt–Nielsen* and reaffirmed his construction of the parties' clause. Oxford then moved the District Court to vacate the arbitrator's most recent award or, in the alternative, to reconsider its own 2005 decision denying vacatur. The District Court denied Oxford's motion and granted Sutter's cross-motion to confirm the award. *Sutter v. Oxford Health Plans, LLC*, Nos. 05–CV–2198, 10–CV–4903, 2011 WL 734933, 2011 U.S. Dist. LEXIS 17123 (D.N.J. Feb. 22, 2011). Oxford appeals.

II

The District Court exercised diversity jurisdiction over this matter pursuant to 28 U.S.C. § 1332. We have jurisdiction over Oxford's appeal under the Federal Arbitration Act, 9 U.S.C. § 16(a)(1)(D) ("An appeal may be taken from ... an order ... confirming or denying confirmation of an award or partial award.").[1]

On appeal from a district court's ruling on a motion to confirm or vacate an arbitration award, we review its legal conclusions de novo and its factual findings for clear error. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947–48, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995), *aff'g* 19 F.3d 1503, 1509 (3d Cir.1994); *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 278–79 (3d Cir. 2003).

A more deferential standard of review applies to the arbitration award itself. We do not entertain claims that an arbitrator has made factual or legal errors. Rather, mindful of the strong federal policy in favor of commercial arbitration, we begin with the presumption that the award is enforceable. *See Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24–25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). An award may be vacated only upon one of the four narrow grounds enumerated in the Federal Arbitration Act:

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[1] Anomalously, the Federal Arbitration Act creates a body of federal substantive law without creating any independent federal-question jurisdiction. *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 25 n. 32, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). It does, however, confer appellate jurisdiction, including over interlocutory judicial orders. *See* 9 U.S.C. § 16(a). In a court of competent jurisdiction, assuming ripeness, interlocutory arbitral awards on the availability of class arbitration are reviewable under the Act. *See Stolt–Nielsen*, 130 S.Ct. at 1766–67 & n. 2.

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a). These grounds are exclusive and may not be supplemented by contract. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008), *overruling Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 288 (3d Cir. 2001). In sum, when parties agree to resolve their disputes before an arbitrator without involving the courts, the courts will enforce the bargains implicit in such agreements by enforcing arbitration awards absent a reason to doubt the authority or integrity of the arbitral forum. *See id.* at 586, 128 S.Ct. 1396 (characterizing the exclusive statutory bases for

vacatur as "egregious departures from the parties' agreed-upon arbitration").

The basis for vacatur asserted in this case, § 10(a)(4) of the Federal Arbitration Act, permits district courts to vacate awards when arbitrators exceed their powers. "Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). By contractually restricting the issues they will arbitrate, the individuals with whom they will arbitrate, and the arbitration procedures that will govern, parties to an arbitration agreement may place limits upon the arbitrator's powers that are enforceable by the courts. *See Puleo v. Chase Bank USA, N.A.*, 605 F.3d 172, 181 (3d Cir. 2010) (en banc). An arbitrator oversteps these limits, and subjects his award to judicial vacatur under § 10(a)(4), when he decides an issue not submitted to him, grants relief in a form that cannot be rationally derived from the parties' agreement and submissions, or issues an award that is so completely irrational that it lacks support altogether. *Ario v. Underwriting Members of Syndicate 53 at Lloyds for the 1998 Year of Account*, 618 F.3d 277, 295–96 (3d Cir. 2010) (citing *Mut. Fire, Marine & Inland Ins. Co. v. Norad Reins. Co.*, 868 F.2d 52, 56 (3d Cir. 1989)). In other words, the task of an arbitrator is to interpret and enforce a contract. When he makes a good faith attempt to do so, even serious errors of law or fact will not subject his award to vacatur. *See Brentwood Med. Assocs. v. United Mine Workers of Am.*, 396 F.3d 237, 243 (3d Cir. 2005) (upholding an arbitration award despite the arbitrator's inexplicable reliance on language not found in the relevant agreement). But when the arbitrator "strays from interpretation and application of the agreement and effectively 'dispenses his own brand of industrial justice,'" he exceeds his powers and his award will be unenforceable. *Stolt–Nielsen*, 130 S.Ct. at 1767 (quoting *Major League Baseball Players Ass'n. v. Garvey*, 532 U.S. 504, 509, 121 S.Ct. 1724, 149 L.Ed.2d 740 (2001) (per curiam) (quoting *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960))).[2]

An arbitrator may exceed his powers by ordering class arbitration without authorization. In *Stolt–Nielsen*, the Supreme Court held that arbitrators may not infer parties' consent to class arbitration procedures solely from the fact of their agreement to arbitrate. 130 S.Ct. at 1775. Therefore, an arbitrator lacks the power to order class arbitration unless there is a contractual basis for concluding that the parties agreed to that procedure. *Id.*

III

Stolt–Nielsen arose out of a Department of Justice investigation which revealed that Stolt–Nielsen and other shipping companies were engaged in an illegal price fixing conspiracy. *Id.* at 1765. AnimalFeeds and other customers of the shipping companies brought class action antitrust lawsuits, which were consolidated by the Judicial Panel on Multidistrict Litigation. *Id.* AnimalFeeds' suit was subsequently referred to arbitration on the basis of an arbitration clause in the "Vegoilvoy" charter party, a standard form shipping contract that AnimalFeeds had selected. *Id.* at 1764–65. When AnimalFeeds then sought to proceed in arbitration on a classwide basis, the parties agreed to submit the issue of class arbitration to a panel of three arbitrators. *Id.* at 1765. After hearing argument and testimony, the arbitrators concluded that class arbitration was permitted. *Id.* at 1766.

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[2] Like the Supreme Court, this Court will refer to the federal common law developed under *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 456–57, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957), for judicial review of labor arbitration awards under the Labor Management Relations Act, 29 U.S.C. § 185, to elaborate the meaning of the Federal Arbitration Act's statutory grounds for vacatur. *See Swift Indus., Inc. v. Botany Indus., Inc.*, 466 F.2d 1125, 1130 & n. 11 (3d Cir. 1972); *cf. Hall St.*, 552 U.S. at 585, 128 S.Ct. 1396 (suggesting without deciding that the judicially created manifest disregard of law ground for vacatur may be properly considered only as a judicial gloss on the statutory grounds); *Stolt–Nielsen*, 130 S.Ct. at 1768 n. 3 (same).

Before the arbitrators, the parties stipulated that the arbitration clause in the Vegoilvoy charter party was "silent" with respect to class arbitration, in the sense that they had not reached any agreement on that issue. *Id.* at 1766. "Counsel for AnimalFeeds explained to the arbitration panel that the term 'silent' did not simply mean that the clause made no express reference to class arbitration. Rather, he said, 'all parties agree that when a contract is silent on an issue there's been no agreement that has been reached on that issue.'" *Id.* Thus, the arbitration clause was silent but "not ambiguous so as to call for parol evidence" because "the parties were in complete agreement regarding their intent." *Id.* at 1770 (internal quotation marks omitted). The arbitrators were bound to conclude that the parties intended neither to authorize nor to preclude class arbitration. *See id.*

The parties' stipulation left the arbitrators unable to apply traditional principles of contract interpretation. It obviously "left no room for an inquiry regarding the parties' intent, and any inquiry into that settled question would have been outside the panel's assigned task." *Id.* Nor could the panel construe the text of the arbitration clause because, in light of the parties' stipulation, "the particular wording of the charter party was quite beside the point." *Id.*

"Because the parties agreed their agreement was 'silent' in the sense that they had not reached any agreement on the issue of class arbitration, the arbitrators' proper task was to identify the rule of law that governs in that situation." *Id.* at 1768 (identifying the Federal Arbitration Act, federal maritime law, and New York law as possible sources of a governing rule). Instead, the panel based its decision that class arbitration was permitted on the parties' failure to contractually preclude the procedure and on other arbitral decisions construing other clauses to allow class arbitration. *Id.* In so doing, the Supreme Court held, the arbitrators impermissibly assumed the power of a common law court to fashion a rule of decision. *Id.* at 1769. By doing so, rather than interpreting the contract under the governing law, the arbitrators exceeded their powers within the meaning of § 10(a)(4) of the Federal Arbitration Act. *Id.* at 1770.

The Supreme Court held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 1775 (emphasis in original). The Court therefore faulted the arbitrators for imposing class arbitration in the absence of any agreement on the issue and on the basis that the parties had not intended to *preclude* class arbitration. *Id.* Although parties may implicitly authorize arbitrators to adopt necessary procedures, the Court held that "[a]n implicit agreement to authorize class-action arbitration ... is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate." *Id.* "[T]he differences between bilateral and class-action arbitration are too great for arbitrators to presume ... that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." *Id.* at 1776; *see also AT & T Mobility LLC v. Concepcion*, — U.S. —, 131 S.Ct. 1740, 1752, 179 L.Ed.2d 742 (2011) (further articulating the "fundamental" differences between bilateral arbitration and class arbitration).[3]

Stolt–Nielsen did not establish a bright line rule that class arbitration is allowed only under an arbitration agreement that incants "class arbitration" or otherwise expressly provides for aggregate procedures. *Stolt–Nielsen*, 130 S.Ct. at 1776 n. 10; *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 124 (2d Cir. 2011) (holding that an arbitrator did not exceed her powers by ruling that class arbitration was allowed under an agreement lacking an express class provision). The Court underscored this point, writing, "We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration. Here, as noted, the parties stipulated that there was 'no agreement' on the issue of class-action arbitration." 130 S.Ct. at 1776 n. 10; *see also id.* at 1783 (Ginsburg, J., dissenting) ("[T]he Court does not insist on express consent to class arbitration.").

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[3] In *AT & T Mobility LLC v. Concepcion*, the Supreme Court held that the Federal Arbitration Act preempts a California common law rule invalidating class waivers in arbitration clauses as unconscionable. *See* — U.S. —, 131 S.Ct. 1740, 1753, 179 L.Ed.2d 742 (2011). The Court found its decision in *Stolt–Nielsen* to be "instructive." *Id.* at 1750. Because class arbitration necessarily sacrifices the informality, speed, and cost savings of arbitration and increases the stakes without increasing the level of judicial scrutiny available under the Federal Arbitration Act, the Court found "it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision." *Id.* at 1752. Recognizing that parties *could* agree to class arbitration if they so chose, the Court held that this procedure may not be *required* by state law. *Id.* at 1752–53.

Instead, *Stolt–Nielsen* established a default rule under the Federal Arbitration Act: "[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 1775 (emphasis in original). Absent a contractual basis for finding that the parties agreed to class arbitration, an arbitration award ordering that procedure exceeds the arbitrator's powers and will be subject to vacatur under § 10(a)(4).[4]

IV

Oxford argues that the clause construction award at issue in this case should be vacated because the arbitrator exceeded his powers under *Stolt–Nielsen.* According to Oxford, "the arbitrator found that the arbitration clause between Sutter and Oxford is silent on the issue of class arbitration, but he went on to conclude that the clause permits class arbitration in light of its breadth and the absence of a class arbitration exclusion." (Appellant's Br. at 14). Oxford charges that the arbitrator imposed his own default rule, in derogation of *Stolt–Nielsen* and New Jersey law, based on his own conceptions of public policy.

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[4] Thus, the District Court misstated the law when it wrote that the arbitrator must decide whether the arbitration clause "forbids" class arbitration. *See Sutter v. Oxford Health Plans, LLC,* 2011 WL 734933, at *4, 2011 U.S. Dist. LEXIS 17123, at *12 (quoting *Vilches v. The Travelers Cos.,* 413 Fed.Appx. 487, 492 (3d Cir.2011)). It is evident from the District Court's discussion, however, that it properly understood that *Stolt–Nielsen* allows class arbitration only where the parties intend to authorize it, as the arbitrator found they did in this case. In any event, upon de novo review under the appropriate standard, we conclude that the arbitration award stands.

As an initial matter, we reject Oxford's attempt to cast this case in the mold of *Stolt–Nielsen*. The arbitration clause in its Agreement does not refer to class arbitration. Yet it is not "silent" in the way that the Vegoilvoy charter party was "silent" in *Stolt–Nielsen*, and Oxford equivocates when it suggests otherwise.[5] No stipulation between Oxford and Sutter is conclusive of the parties' intent and, indeed, the parties dispute whether or not they intended to authorize class arbitration. Therefore, the arbitrator in this case was not constrained to conclude that the parties did not intend to authorize class arbitration or, on the other hand, to identify a contrary default rule of New Jersey law. *Cf. Stolt–Nielsen*, 130 S.Ct. at 1769–

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[5] Oxford seems to suggest that an arbitration provision is "silent" whenever the words "class arbitration" are not written into the text of the arbitration clause. This rule finds no support in *Stolt–Nielsen*. It would effectively impose on all contracting parties an obligation to use the words "class arbitration" to signal their intention to authorize class arbitration. But *Stolt–Nielsen* did not purport to restrict the freedom of contracting parties in this way. Rather, it repeatedly emphasized that the fundamental duty of the arbitrator and the courts to effectuate parties' intentions. *Stolt–Nielsen*, 130 S.Ct. at 1773–74. Oxford's approach would cabin the freedom of contracting parties, safeguarded by the Federal Arbitration Act, to structure their arbitration provisions as they see fit. *See id.* at 1774 ("Underscoring the consensual nature of private dispute resolution, we have held that parties are generally free to structure their arbitration agreements as they see fit.") (internal quotation marks and citation omitted).

70. His decision to order class arbitration is within his authority so long as it stands on a contractual basis. *See id.* at 1775.

As Oxford concedes, the arbitrator did articulate a contractual basis for his decision to order class arbitration. Appropriately, the arbitrator made first resort to the text of the arbitration clause:

> No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the Rules of the American Arbitration Association with one arbitrator.

(App. 55). He reasoned that the clause's first phrase, "No civil action concerning any dispute arising under this Agreement shall be instituted before any court," is broad enough to include class actions. Thus, its second phrase, "and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the Rules of the American Arbitration Association with one arbitrator," sends all conceivable civil actions—including class actions—to arbitration. In other words, the phrase "no civil action ... shall be instituted in any court" meant that a class action may not be instituted in a court of law. "All such disputes" must go to arbitration.

Oxford attacks the contractual basis for the arbitrator's decision by asserting that the arbitrator's purported examination of the parties' intent was pretext for the imposition of his policy preferences. *See Stolt–Nielsen*, 130 S.Ct. at 1769–70 (concluding that the arbitral panel had impermissibly imposed its preferred policy notwithstanding its references to the parties' intent, where the parties stipulated that they had formed no intent). According to Oxford, if the arbitrator were actually desirous of determining the parties' intent, he would have sought it not in the text of their agreement to arbitrate but instead in their briefing before the New Jersey Superior Court. In that forum, Sutter opposed enforcement of the arbitration agreement on the ground that it would send the dispute to individual arbitration, which, he argued, would be contrary to New Jersey public policy. Oxford argues that Sutter's submissions to the Superior Court, together with Oxford's own representations that its Agreement did not contemplate arbitration on a class-wide basis, were tantamount to a stipulation that the parties did not intend to authorize class arbitration. *Cf. id.* at 1766.

Oxford's argument lacks force because Sutter's litigation position in the Superior Court is not conclusive, or even particularly probative, of the meaning of a clause drafted solely by Oxford. *Cf. id.* at 1775 (relying on the stipulation of the sophisticated business entity that had selected the charter party). We observe, further, that Sutter's litigation position was not uniform: Sutter alternatively urged the Superior Court to certify the class before sending the claims to arbitration, and he argued before the arbitrator that the clause could be construed to affirmatively authorize class arbitration. Without a conclusive statement of the parties' intent or clear evidence of arbitral overreaching, we must conclude that the arbitrator performed his duty appropriately and endeavored to give effect to the parties' intent. In this light, Oxford's allegations of pretext are simply dressed-up arguments that the arbitrator interpreted its agreement erroneously.

The remainder of Oxford's arguments are similarly uncognizable claims of factual and legal error. In particular, Oxford argues that the arbitrator improperly inferred the parties' intent to authorize class arbitration from the breadth of the parties' arbitration agreement and from its failure to preclude class arbitration. In his clause construction award, the arbitrator remarked that the parties' arbitration clause was unique in its breadth. Construing the broad text and structure of the clause, he concluded that the parties affirmatively intended to authorize arbitration on a class-wide basis. Then, given his construction of the clause, the arbitrator noted that an express exception for class arbitration would be required to carve out and prohibit class arbitration. Oxford submits that the arbitrator thereby relied on two grounds that *Stolt–Nielsen* had expressly proscribed.

The arbitrator unquestionably relied on the breadth of the arbitration agreement, but *Stolt–Nielsen* does not proscribe such reliance. Rather, it acknowledges the relevance of an arbitration agreement's breadth to the determination of whether it authorizes class arbitration. In *Stolt–Nielsen*, the Supreme Court concluded that the arbitration panel "imposed its own conception of sound policy" in derogation of its duty to interpret the arbitration agreement and apply the law. 130 S.Ct. at 1769. The Court acknowledged indications that were arguably contrary to its conclusion: The panel had referred to the parties' intent and had commented on the breadth of the arbitration agreement. *Id.* at 1770. But the Court nonetheless held that these references and comments could not overcome the parties' stipulation that they had reached no agreement on the issue of class arbitration. In light of the parties' stipulation, "the panel had no occasion to ascertain the parties' intention" and "the particular wording of the charter party was quite beside the point." *Id.* (internal quotation marks omitted). The lesson from this discussion is that where, as here, the parties' intent with respect to class arbitration is in question, the breadth of their arbitration agreement is relevant to the resolution of that question.

Stolt–Nielsen does prohibit an arbitrator from inferring parties' consent to class arbitration solely from their failure to preclude that procedure, but the arbitrator did not draw the proscribed inference in this case. Rather, the arbitrator construed the text of the arbitration agreement to authorize and require class arbitration. Then he observed that an express carve-out for class arbitration would have made it unavailable even under the clause's otherwise broad language. As the arbitrator later articulated when he revisited his construction of the clause in light of *Stolt–Nielsen*, the lack of an express exclusion was merely corroborative of his primary holding that the parties' clause authorized class arbitration; it was not the basis of that holding. Thus, the arbitrator did not impermissibly infer the parties' intent to authorize class arbitration from their failure to preclude it.

We are satisfied that the arbitrator endeavored to interpret the parties' agreement within the bounds of the law, and we cannot say that his interpretation was totally irrational. Nothing more is required under § 10(a)(4) of the Federal Arbitration Act.

V

Because the arbitrator did not exceed his powers by construing the parties' arbitration agreement to authorize class arbitration, we will affirm the Order of the District Court.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civ. No. 05-2198 (GEB)
Civ. No. 10-4903 (GEB)

JOHN IVAN SUTTER, M.D., *Plaintiff*,

v.

OXFORD HEALTH PLANS LLC, *Defendant*.

Filed February 22, 2011

MEMORANDUM OPINION

NOT FOR PUBLICATION

BROWN, Chief Judge:

This matter comes before the Court upon the following motions filed in Civ. No. 05-2198 (hereinafter, the "'05 Case"): (1) the motion to vacate arbitration award and/or for reconsideration filed by Defendant Oxford Health Plans, LLC ("Oxford"); (2) the cross-motion to confirm arbitration award filed by Plaintiff John Ivan Sutter, M.D. ("Sutter"); and (3) the motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) filed by Sutter. (Doc. Nos. 31, 38, 42.) And, further, upon the following motions filed in Civ. No. 10-4903 (hereinafter, the "'10 Case"): (1) the motion to dismiss filed by Oxford; and (2) the motion to remand filed by Sutter. (Doc. Nos. 5, 8.) All of the foregoing motions are opposed, and the Court has considered them without oral argument pursuant to Fed. R. Civ. P. 78. Having done so, for the reasons that follow, the Court concludes that federal subject-matter jurisdiction exists in both cases, that the arbitrator's award should be confirmed in the '05 Case, and that Oxford's motion to dismiss should be denied in the '10 Case.

I. BACKGROUND

As the Court writes only for the parties, discussion will be limited to the allegations, the facts, and the aspects of these two cases' procedural histories that are relevant to the Court's present decision.

On September 23, 2003, W.L.D. Bennett ("Bennett"), arbitrator in the parties' underlying arbitration, issued a Clause Construction Award that allowed class arbitration pursuant to the parties' arbitration agreement. Thereafter, on March 25, 2005, Bennett issued his "Partial Final Class Determination Award" (the "Partial Award") that, among other things, integrated and gave effect to Bennett's prior Clause Construction Award. Subsequently, on April 25, 2005, Oxford filed a petition in the District of New Jersey to vacate Bennett's Partial Award. That matter, the '05 Case, was assigned to then-District Judge Joseph A. Greenaway, Jr, since elevated to the United States Court of Appeals for the Third Circuit. On May 9, 2005, Sutter opposed Oxford'spetition to vacate, and also filed a cross-motion to dismiss the '05 Case based upon Sutter's assertion that subject-matter jurisdiction did not exist.

On October 31, 2005, Judge Greenaway issued an opinion and order that denied both Sutter's motion to dismiss, and Oxford's motion to vacate the Partial Award. In support of that decision, Judge Greenaway concluded: (1) that federal subject-matter jurisdiction exists in this matter pursuant to 28 U.S.C. Section 1332(a), because the parties are diverse and substantially more than $75,000 is at issue; and (2) that under then-controlling precedent, Bennett did not exceed his powers or manifestly disregard the law in the Partial Award. Oxford promptly appealed, and on February 28, 2007, a panel of the Third Circuit affirmed. Following these rulings, class arbitration proceeded before Bennett in accordance with the Partial Award.

On April 27, 2010, the United States Supreme Court decided *Stolt-Nielsen S.A.,* ET AL. *v. Animalfeeds International Corp.*, 130 S. Ct. 1758 (2010), and therein addressed the issue of class arbitration. In light of *Stolt-Nielsen*, Oxford asked Bennett to reconsider and vacate his prior decisions that allowed class arbitration pursuant to the parties' arbitration agreement. On July 6, 2010, Bennett issued Procedural Order No. 18. ("Order No. 18"), in which he revisited both the Clause Construction Award and the Partial Award, but concluded that class arbitration of the claims at issue remained mandated by the parties' arbitration agreement following the *Stolt-Nielsen* decision.

On August 13, 2010, Oxford moved to reopen this case, and on September 7, 2010, this Court ordered the '05 Case case reopened and reassigned to the undersigned in light of Judge Greenaway's elevation. Also on August 13, 2010, in addition to its motion to reopen, Oxford filed its present motion to either vacate Bennett's July 6, 2010 decision pursuant to provisions of the Federal Arbitration Act ("FAA"), or for reconsideration of Judge Greenaway's October 31, 2005 decision in light of *Stolt-Nielsen*. In response, Sutter filed: (1) opposition to Oxford's motion; (2) a cross-motion to confirm Bennett's July 6, 2010 decision; and (3) a motion to dismiss for lack of subject-matter jurisdiction. Oxford opposes Sutter's motions.

On September 23, 2010, as the parties briefed the various motions filed in the '05 Case, Oxford removed a verified complaint filed by Sutter in Essex County Superior Court, Law Division, to the District of New Jersey. As a result, the '10 Case was opened and assigned to this Court. While both the '05 and '10 Cases arise out of the class arbitration between the parties, the specific issues presented by each case are different. In the verified complaint that frames the '10 Case, Sutter seeks an order to show cause why Bennett's Procedural Order No. 19 ("Order No. 19"), which was issued on July 29, 2010, should not be vacated, apparently pursuant to provisions of the FAA. Less than a week after removing Sutter's verified complaint, and before either Sutter or the Court took further action on Sutter's underlying request for an order to show cause, Oxford filed a motion to dismiss Sutter's verified complaint in the '10 Case. In support of that motion, Oxford argues that: (1) Order No. 19 is not subject to judicial review; and (2) if reviewed by the Court, Bennett's decision should not be vacated. In response, Sutter opposed Oxford's motion, and on November 12, 2010, also filed a motion to remand the '10 Case for lack of subject-matter jurisdiction.

II. DISCUSSION

A. Subject-Matter Jurisdiction

Sutter argues that there is no federal subject-matter jurisdiction in either the '05 or the '10 Cases.[1] Fundamentally, Sutter challenges the existence of Section 1332 diversity jurisdiction on the following two bases: (1) that Oxford's citizenship is not diverse; and (2) that the $75,000 amount in controversy requirement is not met. The Court concludes that both arguments are specious for the following reasons.

Nearly six years ago, shortly after Oxford filed the petition to vacate Bennett's Partial Award that gave rise to the '05 Case, Sutter lodged a similar challenge to federal subject-matter jurisdiction in a cross-motion to dismiss. (Doc. No. 5.) In his October 31, 2005 memorandum opinion, Judge Greenaway decided that Section 1332 diversity jurisdiction exists in the '05 Case because: (1) "[t]he parties do not dispute that they are of diverse citizenship: Sutter is a citizen of New Jersey and Oxford is a citizen of Minnesota"; and (2) "as Sutter has not questioned Oxford's $5,000,000 [alleged damages] figure, and this Court discerns no basis to conclude to a legal certainty that the claim is really for less than $75,000, the amount in controversy requirement of Section 1332(a) is satisfied." (JAG 10/31/05 Mem. Op at p. 5; Doc. No. 21) Sutter did not appeal Judge Greenaway's decision that diversity jurisdiction exists in the '05 Case. Further, in affirming Judge Greenaway's October 31, 2005 denial of Oxford's motion to vacate the Partial Award, the Third Circuit did not address subject-matter jurisdiction in any way. As such, the procedural history of this case makes clear that Judge Greenaway explicity, and a panel of the Third Circuit implicitly, determined that diversity jurisdiction exists in this case. In light of these well-reasoned and settled decisions, the Court shall not revisit that determination.

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[1] Sutter makes the identical argument in both the '05 and '10 Cases via two different motions: (1) in the '05 Case, Sutter has filed a motion to dismiss; and (2) in the '10 Case, Sutter has filed a motion to remand. In support of his after-filed motion to remand in the '10 Case, Sutter expressly relies upon his filings in support of his motion to dismiss in the '05 case. The Court's analysis of both motions, therefore, is coextensive.

In an abundance of caution, however, the Court will alternately address the grounds upon which Sutter's present jurisdictional motions are based, and explain why those grounds are not sufficient. First, it is apparent from Judge Greenaway's October 31, 2005 memorandum opinion that, in support of his initial challenge to subject-matter jurisdiction, Sutter disputed neither that Oxford was the appropriate party in interest, nor that Oxford's citizenship was diverse. As noted, Sutter did not appeal Judge Greenaway's October 31, 2005 decision. Therefore, Sutter's present, untimely attempt to take a fresh bite at this jurisdictional apple must be rejected. Sutter is plainly estopped from taking a position that he either failed to assume, or to appropriately pursue, in his initial motion to dismiss filed nearly six years ago.

Furthermore, Sutter's second argument, that the $75,000 amount in controversy threshold for diversity jurisdiction is not met, fails for the same reason. Indeed, beyond Judge Greenaway's unappealed and implicitly affirmed prior determination on this point, the Court concludes that the evidence submitted by Sutter in support of his argument does not prove Sutter's point to a legal certainty, as is of course required to defeat diversity jurisdiction in the face of adequately pled damages. *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938). Here, Sutter submitted only the certification of a purported damages expert, which was promptly rebutted by Oxford in its opposition via the submission of an affidavit from its own purported expert. Thus, at most, the parties' submissions have created an issue of fact regarding damages. As noted, that falls far short of the threshold required standard.

For these reasons, as Judge Greenaway correctly noted more than five years ago, "[t]his Court has subject matter jurisdiction over this matter." (JAG 10/31/05 Mem. Op at p. 5; Doc. No. 21) In light of that determination, Sutter's motion to dismiss in the '05 Case, and motion to remand in the '10 Case, will be denied.

B. Procedural Order No. 18

The issue that revived the '05 case is Oxford's motion to either vacate Bennett's July 6, 2010 Order No. 18, or alternately, for reconsideration of Judge Greenaway's October 31, 2005 decision to confirm the Partial Award.[2] In support of that motion, Oxford argues that Bennett exceeded his powers when he decided the parties' arbitration agreement allowed for class action arbitration in light of *Stolt-Nielsen*. In response, Sutter opposes Oxford's motion, and in a cross-motion, argues that Bennett's decision should be confirmed. The Court agrees with Sutter, and will confirm Bennett's Order No. 18 for the following reasons.

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[2] The Court will not reconsider Judge Greenaway's October 31, 2005 decision, which was subsequently affirmed by the Third Circuit. Instead, the Court will consider in the first instance whether Bennett's Order No. 18 should be vacated pursuant to the relevant provisions of the FAA and related jurisprudence. Thus, the Court will henceforth refer to Oxford's present motion as one to "vacate".

As relevant here, Section 10 of the FAA provides that the district court may only vacate an arbitrator's award, "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. Section 10(a)(4). In *Stolt-Nielsen*, the Supreme Court reinforced the narrowness of judicial review pursuant to this statute. Here, Oxford contends that Bennett's Order No. 18 must be vacated, but for the Court to grant that relief, Oxford "must clear a high hurdle." *Stolt-Nielsen*, 130 S. Ct. at 1767. Indeed, for this Court to vacate, it is not enough for Oxford to show that Bennett "committed an error— or even a serious one." *Id.* (citing *Eastern Associated Coal Corp. v. Mine Workers*, 531 U.S. 57, 62 (2000); *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 38 (1987)). Rather, "'it is only when [an] arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice' that his decision is unenforceable.'" *Id.* (quoting *Major League Baseball Players Assn. v. Garvey*, 532 U.S. 504 (2001) (quoting *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960)). "In that situation, an arbitration decision may be vacated under [Section 10(a)(4) of the FAA] on the ground that the arbitrator 'exceeded his powers,' for the task of an arbitrator is to interpret and enforce a contract, not to make public policy." *Id.*

Further, "'[t]he Supreme Court has made clear that questions of 'contract interpretation' aimed at discerning *whether* a particular procedural mechanism is authorized by a given arbitration agreement are matters for the arbitrator to decide.'" *Vilches*, ET AL. *v. The Travelers Cos., Inc.*, ET AL., No. 10-2888, 2011 U.S. App. LEXIS 2551 at *11 (3d Cir. Feb. 9, 2011) (quoting *Puleo v. Chase Bank USA, N.A.*, 605 F.3d 172, 179 (3d Cir. 2010) (emphasis in original). "Where contractual silence is implicated, 'the arbitrator and not a court should decide whether a contract [was] indeed 'silent' on the issue of class arbitration," and "whether a contract with an arbitration clause forbids class arbitration." *Id.* (quoting *Stolt-Nielsen*, 130 S. Ct. 1771-72).[3]

In light of this standard, the Court will confirm Bennett's Order No. 18, because the Court concludes that Oxford's motion to vacate is fundamentally flawed on at least the following two critical points: (1) the Court's standard of review; and (2) the upshot of *Stolt-Nielsen*. As to the first issue, though Oxford's motion to vacate recites case-law that acknowledges the Court's highly deferential standard of review under the FAA, in substance, Oxford's submissions ask the Court to revisit and reconsider virtually every aspect of Order No. 18. Viewed in sum, Oxford's arguments advocate for a standard that appears closer to *de novo* than deferential review. This confusion may be attributable to the hazy procedural basis for Oxford's motion to vacate, which, as noted, was alternately couched as a motion for reconsideration of Judge Greenaway's October 31, 2005 decision. In any event, the Court concludes that Oxford's motion to vacate is unpersuasive because, for the most part, it is fundamentally out-of-step with the well-established and highly deferential standard of review under the FAA.

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[3] In *Stolt-Nielsen*, the Supreme Court expressly declined to address the present vitality or efficacy of the so-called "'manifest disregard'" standard. *Stolt-Nielsen*, 130 S. Ct. at 1768, fn 3 (quoting *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 553 U.S. 576, 585 (2008)). Similarly, this Court will not engage that issue, but rather, will apply the foregoing, which tracks the standard applied in *Stolt-Nielsen*. For the sake of completeness, however, the Court notes that Oxford's motion plainly fails under any application of the "manifest disregard" standard, as Bennett's Order No. 18 is entirely dedicated to the discussion and application of *Stolt-Nielsen*, the decision that gives rise to this matter and indisputably controls the issue presented.

Furthermore, Oxford appears to misconceive the upshot of *Stolt-Nielsen*. Indeed, Oxford essentially argues that because the parties' arbitration agreement does not state that class action arbitration is allowed, Bennett "exceeded his powers" by not vacating the Partial Award in light of *Stolt-Nielsen*. That interpretation of *Stolt-Nielsen*, however, is not supportable in the present context. While the insertion of the words "class action" to the parties' arbitration agreement would certainly obviate this dispute, as Bennett correctly noted in Order No. 18, *Stolt-Nielsen* does not categorically require the presence of such terms for class action arbitration. To the contrary, in *Stolt-Nielsen*, the Court expressly declined "to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration." *Stolt-Nielsen*, 130 S. Ct. at 1776, fn 10. Here, after giving full consideration to *Stolt-Nielsen*, Bennett concluded that the contractual basis between these parties, i.e. their arbitration agreement, clearly and unambiguously expressed their intent to authorize class action arbitration despite omission of the words "class action". Simply put, *Stolt-Nielsen* does not militate a contrary result. In fact, the Court concludes that Order No. 18 suggests that Bennett performed the appropriate function of an arbitrator under the FAA after *Stolt-Nielsen*; Bennett examined the parties' intent, and gave effect to the arbitration agreement.

In sum, given the highly deferential standard of review applicable in this matter, the Court discerns no basis to overturn Bennett's Order No. 18. Rather, the Court concludes that Bennett thoroughly considered and rationally applied *Stolt-Nielsen* to this complex case. For example, Bennett identified and addressed the following critical issues raised in *Stolt-Nielsen*: (1) the issue of "silence" in the parties' arbitration agreement; (2) the issue of the parties' intent regarding class action arbitration; and (3) the importance of "public policy" determinations to the *Stolt-Nielsen* decision, and the absence of those determinations in this matter. Ultimately, having addressed *Stolt-Nielsen* head-on, Bennett again concluded that the parties' arbitration agreement contemplates class action arbitration. For the foregoing reasons, the Court will confirm that decision. Thus, Oxford's motion to vacate will be denied, and Sutter's cross-motion to confirm will be granted.

C. Procedural Order No. 19

Finally, as noted, Oxford filed a motion to dismiss Sutter's verified complaint in the '10 Case shortly after Oxford removed that verified complaint from New Jersey state court. Having considered the parties' submissions, the Court will deny Oxford's motion to dismiss without prejudice in the interests of justice and fairness. The verified complaint in the '10 Case requests issuance of an order to show cause why Bennett's Procedural Order No. 19 should not be vacated, apparently pursuant to the FAA. By removing the verified complaint and immediately filing a notice to dismiss, Oxford essentially deprived Sutter of the initiative he sought to gain via the order to show cause in state court. In an effort to avoid any prejudice to Sutter that might result from this procedural anomaly, and given the apparent complexity of the issues presented by the '10 Case, the Court will deny Oxford's motion to dismiss. In accord with standard federal practice regarding disputes under Section 10 of the FAA, the Court will grant the parties' 30 days to file motions to vacate/confirm Bennett's Procedural Order No. 19. Those motions, if any, can then be fully and fairly briefed pursuant to the Local Civil Rules that govern litigation in this Court.

III. CONCLUSION

For the foregoing reasons, Sutter's motions to dismiss and to remand in the '05 and '10 Cases will be DENIED; Oxford's motion to vacate Bennett's Order No. 18 will be DENIED; Sutter's cross-motion to confirm Bennett's Order No. 18 will be GRANTED; Oxford's motion to dismiss in the '10 Case will be DENIED, and the Court will grant the parties' 30 days to file motions to vacate/confirm Bennett's Procedural Order No. 19 in the '10 Case. Finally, in light of the foregoing decisions, the Court will order the Clerk of the Court to CLOSE the '05 Case. An appropriate form of order accompanies this memorandum opinion.

Dated: February 22, 2011

/s/ Garrett E. Brown, Jr.
GARRETT E. BROWN, JR., U.S.D.J.

APPENDIX C

AMERICAN ARBITRATION ASSOCIATION

Case No. 18 193 20593 02

JOHN IVAN SUTTER, M.D., ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, *Claimant*,

v.

OXFORD HEALTH PLANS, INC., *Respondent*.

Procedural Order No. 18
Determining Motion

July 6, 2010

Oxford has moved for reconsideration of the Memorandum and Order of September 23, 2003 (the "Clause Construction Award")[1], which found that the arbitration clause in the Agreement in this case allowed for class action arbitration. The Clause Construction Award is attached as Exhibit A; its findings and conclusions are incorporated in this memorandum. This case has proceeded as a class action since that time.

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[1] The Memorandum and Order is referred to in this Order as the Clause Construction Award because at the time it was issued, the Supplemental Rules for Class Action Arbitrations had not yet been adopted by the American Arbitration Association. The parties subsequently agreed that this case would proceed under and be governed by these Rules. When the Class Determination Award was entered, the Memorandum and Order was attached to it and both were subject to motions to confirm and vacate in the United States District Court for the District of New Jersey. The awards were confirmed and the confirmation was affirmed by the Third Circuit Court of Appeals.

Oxford seeks redetermination of the Clause Construction Award under a recent decision of the United States Supreme Court, *Stolt-Nielson S.A. v. Animal Feeds Int'l Corp.*, No 08-1198, 50 U.S._, slip op. (April 27, 2010) Oxford argues that the *Stolt-Nielson* ruling has retroactive effect, and under the teaching of *Stolt-Nielsen*, the determination previously made in this case is incorrect, should be reversed and the class action proceedings discontinued.

For the reasons below, I agree with Oxford that *Stolt-Nielson* has retroactive effect, but I find that it does not require vacating the previous ruling.

Background

Dr. Sutter originally brought this case in April 2002 as a class action case in the Superior Court of Essex County, New Jersey. Dr. Sutter, a physician, was seeking from Oxford damages and other relief arising out of allegations that, under a Primary Care Physician Agreement between Dr. Sutter and Oxford (the "Agreement"), Oxford failed to pay claims and reduced payment on claims as a result of Oxford's allegedly improper claims processing.

Oxford moved in the Essex County Superior Court to stay Dr. Sutter's civil class action on the ground that the arbitration clause in the Agreement between Dr. Sutter and Oxford required that Dr. Sutter's claims be submitted to arbitration. Oxford was successful in its application to the Court. By order dated October 25, 2002, the Court ordered that Dr. Sutter's Amended Complaint be dismissed and that the matters raised should properly be referred to arbitration in accordance with the Agreement.

Thereafter, Dr. Sutter applied to the Superior Court for an order certifying the case as a class action and determining the class. That motion was denied by order dated November 21, 2002. The Court ordered that all procedural issues including but not limited to, the determination of class certification, be resolved by the arbitrator.

In March, 2003, when I had been appointed arbitrator in this case, *Green Tree Financial Corp, et al.* v. *Bazzle, et al.* (Docket No. 02-634) was pending before the Supreme Court of the United S[t]ates. It appeared sensible to take no action on the class action issues in this arbitration until the determination of the *Green Tree* case had been received and analyzed.

On June 23, 2003 the Supreme Court rendered a decision in the *Green Tree* case (539 U.S. 444). Pursuant to the agreement of the parties, each provided me with a letter outlining their respective views about the meaning of the *Green Tree* case for this arbitration. At a conference with the parties it was agreed that under the *Green Tree* case, I had to determine whether the parties' Agreement allows for class action arbitration. The parties agreed that I should proceed to make that determination *de novo*. Oxford then moved for a determination that this arbitration cannot be maintained as a class action. The parties provided extensive briefs on this issue.

I found, for the reasons discussed in the Clause Construction Award, that on its face, the arbitration clause in the Agreement expressed the parties' intent that class action arbitration could be maintained.

Discussion

Before discussing Oxford's present contentions in detail, it is necessary to note several points on which Oxford seems to me to be correct. First, this arbitration is governed by the Federal Arbitration Act ("FAA") and not by New Jersey procedural law. The FAA applies to all actions affecting commerce. See *Citizens Bank v. Alafabco, Inc., et al.*, 539 U.S. 52 (2003). The arguments made by the Class that this case is somehow an intra-New Jersey matter cannot be accepted. Although the members of the class are New Jersey physicians and health care providers, Oxford's operations including its payment processing and other aspects of its business are located in other states and are not all located in New Jersey. Moreover, the previous awards in this case have been referred to the Federal court in New Jersey for confirmation and an appeal from that court was taken to the United States Court of Appeals for the Third Circuit.

I also agree with Oxford that the ruling of the Supreme Court in *Stolt-Nielsen* should be given retroactive effect. I consider Oxford's motion in this case for reconsideration under the possible retroactive effect of *Stolt-Nielsen* on my prior ruling to be proper. It is accordingly necessary to proceed to the merits of Oxford's motion.

Oxford attacks the Clause Construction Award in this case on several grounds. First it says that because the Award concluded that the arbitration clause was unambiguous and silent on the issue of class arbitration, under *Stolt-Nielsen* there can only be one conclusion: the parties did not agree to authorize class arbitration. Second, Oxford says that the Award suggested that the broad scope of the arbitration clause, contrary to *Stolt-*

Nielsen, implied an agreement by the parties to authorize class arbitration. Third, it says that the Award inferred agreement by the parties to authorize class arbitration due to the lack of a carve-out or prohibition of class proceedings, reasoning that has been expressly rejected by *Stolt-Nielsen*.

The *Stolt-Nielsen* court viewed the central inquiry to be "whether the parties agreed to authorize class arbitration." Moreover, the Supreme Court provided the following directives: 1) a clause that is unambiguous and silent on the issue of class arbitration can lead to "only one possible outcome"—a ruling that the parties did not agree to authorize class arbitration; 2) the substantive breath and 3) the lack of an express prohibition on class arbitration cannot be used to infer an implicit agreement between the parties to authorize class arbitration.

For several reasons, however, the *Stolt-Nielsen* case is not applicable to the determination previously made in this arbitration.

The facts of the *Stolt-Nielsen* arbitration are very different from those presented in this arbitration. The arbitrators in *Stolt-Nielsen* had decided to proceed with class arbitration not on the basis of clause construction but essentially for reasons of public policy and in reliance on determinations made in other arbitral awards. The Supreme Court specifically noted that the panel's reliance on these arbitration determinations confirmed that their award was not based on a finding of the parties' intent.

By contrast, the determination in this arbitration involved no such adventures into public policy but was rather concerned solely with the parties' intent as evidenced by the words of the arbitration clause itself.

In the *Stolt-Nielson* case, the Supreme Court found that the arbitrators had no reason to "ascertain the parties intent, because the parties had stipulated that they were in complete agreement regarding their intent." The parties had stipulated that their agreement was "silent on whether [it] permitted or precluded class arbitration," but that the agreement was not ambiguous so as to call for parole evidence. The Supreme Court said that the stipulation of the parties left no room for inquiry by the arbitrators regarding the parties' intent, and any inquiry into that settled question would have been outside the panel's assigned task.

By contrast, the parties in this arbitration had entered into no such stipulation of agreement. It was accordingly necessary to determine what the intent of the parties was. I found that the arbitration clause unambiguously evinced an intention to allow class arbitration, indeed to require it.

Finally, this case differs from *Stolt-Nielsen* because of its procedural history prior to the arbitration. The claimant in this case actually started a class-action in the New Jersey state court. At the time it was one of many such class actions throughout the United States brought by medical providers against insurance companies, such as Oxford. So far as I know, all of the rest of those cases were consolidated by the multidistrict panel and eventually tried in the United States District Court for the Southern District of Florida. An appeal from the class determinations made by the court is referred to in the class certification award in this case. Dr. Sutter's case was unique among all of those others in that Oxford had inserted into its provider agreement the arbitration clause that was subject to the earlier proceedings.

By invoking the arbitration clause in this case, Oxford succeeded in obtaining an order from the New Jersey Court staying the class-action and referring Dr. Sutter's case to arbitration.

It seems to me that the foregoing matters are sufficient to distinguish this case from *StoltNielsen*. I do not believe that the ruling in that case is controlling here. Even if it were, however, I believe that the Clause Construction Award would withstand *Stolt-Nielsen* scrutiny.

Oxford's first contention is that the arbitration clause in this case was unambiguous and silent on the issue of class arbitration, from which Oxford draws the conclusion that the parties cannot have authorized class arbitration. Oxford is wrong on this issue for several reasons.

Stolt-Ni[elson] reaffirmed the bedrock proposition that the FAA was designed to place arbitration agreements on the same footing as other contracts. Thus, one would construe an arbitration clause in the same way as one would treat any other contractual provision. Oxford argues that since the clause in this case does not explicitly mention class action, the inquiry under the teaching of *Stolt-Nielson* is at an end. Oxford misinterprets both the holding in *Stolt-Nielson* and the words of its own arbitration clause.

First, the crucial fact in *Stolt-Nielson* was the parties' stipulation that the arbitration clause was silent with respect to class arbitration. There had been no meeting of minds on that point and hence no agreement as to class arbitration. There was nothing of the parties' intent for the arbitrators to discover and enforce. The parties themselves had stipulated that there was no intent regarding class arbitration. Since the Court went on to hold that where there is an absence of such intent to have class arbitration, agreement to have class arbitration cannot be inferred, and the determination of the arbitrators could not have been correct or within their powers.

This case could not be more different. There was no stipulation. The issue of the meaning of the arbitration clause and what the parties intended by it came to the arbitrator *de novo*. It was necessary to construe the arbitration clause in the ordinary way to glean the parties' intent. It was not futile, as it would have been in *Stolt-Nielson*, in the face of the parties' stipulation. It was rather a vital exercise to determine what the parties intended by the clause regarding class arbitration. The Court in *Stolt-Nielsen* said that it had no occasion to decide what contractual basis might support a finding that the parties agreed to authorize class action arbitration.

Second, Oxford simply announces that the clause is unambiguous and silent as to class arbitration. However, that conclusion is not for Oxford to make. It is rather for the arbitrator, under *Greentree*, *Stolt-Nielson* itself, and the specific order of the New Jersey court that sent this case to arbitration.

Even assuming that *Stolt-Nielsen* stands for the proposition that under the FAA, a class action arbitration can be maintained only if the arbitration clause authorizes such action, Oxford's argument still fails.

The arbitration clause in this case is as follows:

> No civil action concerning any dispute arising under this agreement shall be instituted before any court, and all such disputes shall be

> submitted to final and binding arbitration in New Jersey, pursuant to the Rules of the American Arbitration Association with one arbitrator.

The arbitration clause speaks of "no civil action." No civil action, in my view, means no civil action, of any form whatsoever. Since a class action is a form of civil action, the clause can be paraphrased: "No class action concerning any dispute arising under this agreement shall be instituted before any court, and all such disputes shall be submitted ... to ... arbitration." "No civil action" simply cannot, as a matter of English, be read to exclude any particular civil proceeding, including a class action, from its coverage.

Therefore, the text of the clause itself authorizes, indeed requires, class-action arbitration.

Oxford argues that the Clause Construction Award relied on absence of specific exclusion of class-action arbitration from this clause to indicate that it was the intention of the parties to include class arbitration[.] If true, this reasoning would run afoul of *Stolt-Nielsen*. However, the Clause Construction Award was not based on such reasoning. The absence of such an exclusion was not something that had to be to be relied on to divine the meaning of the clause. It merely corroborated what was already obvious from the language of the clause itself. "All" means all. As noted in the Clause Construction Award, if it had been the parties' intention to exclude class actions from the clause, in the face of such sweeping language, normal drafting would have suggested a specific exclusion. Similarly, noting that the clause is extraordinarily broad is corroborative of the construction noted above, but not essential to it.

Finally, if there were any doubt about what Oxford itself understood the clause to mean, its actions during the earlier court proceedings speak volumes. Dr. Sutter started a class action, not in arbitration but in court. Oxford itself moved in court successfully to invoke the arbitration clause to force Dr. Sutter's court case into arbitration. Under Oxford's own reading of the clause, it not only authorized a class action in arbitration, it required this particular class action to be sent to arbitration.

I find that there are two consequences from this. First, I think Oxford is judicially estopped from claiming that this case cannot proceed in arbitration as a class action. There is nothing in the *Stolt-Nielsen* case that would support a contrary interpretation. Second, Oxford's actions clearly demonstrate its own construction of its own clause.[2]

Oxford places considerable reliance on the briefing of the parties in connection with the Clause Construction Award. It uses various assertions to try to draw this clause into the cone of silence that *Stolt-Nielsen* suggests obviate intention of the parties to have class arbitration. It claims that parties' briefing made clear there had been no agreement reached on the issue of class arbitration. See Oxford's brief in support, footnote 16, quoting extensively from such sources. For, example, "Dr. Sutter does not point to any contract term that reasonably could be interpreted to provide for 'class arbitration,' or any evidence suggesting the parties intended to permit class arbitration?

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[2] The Clause Construction Award did not find it necessary to deal with the *contra proferentem* arguments raised by Claimants. However, it is obvious that Oxford drafted the arbitration clause; it was not a negotiated clause. Accordingly, it would be construed against Oxford. Oxford's original interpretation of what the clause means is consistent with this construction and must be considered highly persuasive, if not conclusive.

These arguments, ingenious as they are, all founder on two immovable positions: First, Oxford persuaded the New Jersey court, using exactly the opposite argument made here, that Dr. Sutter's class action in court was required by the clause in question to be sent to arbitration.

Under Oxford's reading of the application of *Stolt-Nielsen* to this case, if the clause cannot permit Dr. Sutter's court class action to go to arbitration, then Dr. Sutter's original class action must be outside of the arbitration agreement altogether. Oxford would have to have misled the New Jersey court, and the court class action should be reinstated. This is another way of describing why Oxford should be judicially estopped from advancing this argument.

The second position is that the clause is not at all silent: It plainly says "No civil action ... and all (emphasis supplied) such disputes" are to go to arbitration. It was my task to construe that clause. "All," I found, and would find again, means all, without exception, the entire universe of actions that could possibly have been brought in any court, necessarily including class actions. This is, after all, Oxford's own clause, and we have Oxford's own interpretation of what its clause meant when it used it to require Dr. Sutter to bring this case in arbitration, when he very much wanted to be in court all along. Oxford quotes its own reply brief in the Clause Construction proceeding:

> "If large-scale class action disputes had in fact been contemplated, it is likely the parties

> … would have opted for the courts, which have a well-developed body of procedural and substantive law to deal with class actions. Nothing of that sort was provided for in the contract."

Being in court, however, was what Dr. Sutter attempted; arbitration is where Oxford put him, using this clause.

In sum, we know what the clause plainly means and we know that in 2002, Oxford successfully persuaded a court of that same plain meaning.

For these reasons, I conclude that this case is distinguishable on the facts from the *Stolt-Nielsen* case and is not controlled by it. Moreover, even if *Stolt-Nielsen* applied, the result would be the same because the parties' intent to have class arbitration is clear. Finally, Oxford's own construction of its own clause makes the arguments it advances here untenable; that alone would put this case outside the contemplation of *Stolt-Nielsen*.

On reconsideration, accordingly, I find that the Clause Construction Award of 2003 was and remains correct.

Oxford's motion is denied.

/s/ W.L.D. Barrett
W.L.D. Barrett, Arbitrator

Re: 18 193 20593 02
John Ivan Sutter, M.D.
VS
Oxford Health Plans, Inc.

APPENDIX A

AMERICAN ARBITRATION ASSOCIATION

Case No. 18 193 20593 02

JOHN IVAN SUTTER, M.D., ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, *Claimant*,

v.

OXFORD HEALTH PLANS, INC., *Respondent.*

MEMORANDUM AND ORDER

Dr. Sutter asserts that this case can be maintained as a class action. Oxford seeks by motion to have the case declared not a class action.

Prior Proceedings

Dr. Sutter originally began this case as a part of a larger class action case in the Superior Court of Essex County, New Jersey in April 2002. Dr. Sutter, a physician, was seeking from Oxford damages and other relief arising out of allegations that, under a Primary Care Physician Agreement between Dr. Sutter and Oxford (the "Agreement"), Oxford failed to pay claims and reduced payment on claims as a result of Oxford's improper claims processing tactics.

Oxford moved in the Essex County Superior Court to stay Dr. Sutter's civil class action on the ground that the underlying contract between Dr. Sutter and Oxford required that Dr. Sutter's claims be submitted to arbitration. Oxford was successful in its application to the Court. By order dated October 25, 2002, the Court ordered that Dr. Sutter's Amended Complaint be dismissed and that the matters raised should properly be referred to arbitration in accordance with the Agreement.

Thereafter, Dr. Sutter applied to the Superior Court for an order certifying the case as a class action and determining the class. This motion was denied by order dated November 21, 2002. The Court ordered that all procedural issues including, but not limited to, the determination of class certification, be resolved by the arbitrator.

In March, 2003, having been appointed arbitrator in this case, I conferred with the parties about how to proceed.

It was noted at that time that the Supreme Court of the United States had granted certiorari in a case called *Green Tree Financial Corp. et al. v. Bazzle et al.* (Docket No. 02-634). That case involved issues that might control the determination of the class action issues in this arbitration. Oral argument in that case had been scheduled for April 23, 2003 and a decision by the Supreme Court was expected before early July. It appeared sensible to take no action on the class action issues in this arbitration until the determination of the *Green Tree* case had been received and analyzed. Accordingly, in Procedural Order No. 1, all proceedings in this arbitration were stayed until further order of the arbitrator.

On June 23, 2003 the Supreme Court rendered a decision in the Green Tree case. Pursuant to the agreement of the parties, each provided me with a letter outlining their respective views about the meaning of the Green Tree case for this arbitration. At a conference with the parties it was agreed that under the Green Tree case, I must determine whether the parties' Agreement allows for class action arbitration. As outlined in procedural Order No. 2, Oxford moved for a determination that this arbitration cannot be maintained as a class action. The parties provided extensive briefs on this issue. The motion is determined as provided in this memorandum and order.

Discussion

It is axiomatic that questions of Arbitrability begin with an analysis of the parties' agreement. This is particularly true since the Green Tree case. It was widely supposed that the Supreme Court would rule, as some lower Federal Courts had, that the Federal Arbitration Act does not allow class actions in arbitration unless the parties have specifically agreed to class action arbitration. It can be noted that neither in the Green Tree case nor in this case does the arbitration clause contain any such express mention of class action arbitrations.

While commentators will no doubt spend much ink and learning on the several opinions the divided Supreme Court issued, one thing seems clear to me at least: a blanket prohibition on arbitration class actions without specific authorization in the arbitration clause was firmly rejected. The argument to that effect by the Petitioner and the *amici* persuaded only three Justices.

It can be argued that all of the remaining six, explicitly or implicitly, believed that class action arbitration without specific authorization is not impossible, but is rather a question of construction of the parties' agreement. In any event, whatever else Green Tree stands for, it means that whether a class action in arbitration is possible turns on the interpretation of the parties' agreement and that such interpretation is to be made by the arbitrator. I therefore commence analysis of this case with the premise that a class action arbitration is a possible outcome and that it is for me, as arbitrator, to make that determination.

I further note that in this case the prior determination of the Superior Court of Essex County admits the possibility that class action arbitration is available in this case. It could be argued that under the Green Tree case, the Court did exactly the right thing, that is it sent the case to arbitration with the specific statement that "all procedural issues including, but not limited to, the determination of class certification, shall be resolved by the arbitrator." The Court may have thought that it had already determined that a class action was available, with only the procedural issues, such as determination of the actual class, left for the arbitrator. The parties in this case have agreed that I should proceed to make the determination, which I do in this memorandum, *de novo*.

The Arbitration Clause

To begin the analysis at the beginning, we turn first to the arbitration clause in the Agreement. It provides in part:

> No civil action concerning any dispute arising under this agreement shall be instituted before any court, and all such disputes shall be

> submitted to final and binding arbitration in New Jersey, pursuant to the Rules of the American Arbitration Association with one arbitrator.

This clause is much broader even than the usual broad arbitration clause. The introductory phrase, "No civil action concerning any dispute arising under this agreement shall be instituted before any court," is unique in my experience and seems to be drafted to be as broad as can be. "No civil action" must mean-no civil action of any kind whatsoever. The clause prohibits civil actions in law, equity, admiralty or even probate. No such action shall be instituted in "any court." Any court includes any Federal or State Court, any foreign court or the Court at the Hague. Taken together, this phrase has the effect of prohibiting any conceivable court action concerning any dispute under the Agreement. It would not be possible to draft a broader or more encompassing clause.

Having prohibited all conceivably possible civil actions, the clause takes this universal and unlimited class of prohibited civil actions and says, "and all such disputes shall be submitted to final and binding arbitration ..."

This means that the clause sends to arbitration "all such disputes," which, apart from the prohibition, could have been brought in the form of any conceivable civil action. Since there can be no dispute in any court without a civil action of some sort, the disputes that the clause sends to arbitration are the same universal class of disputes the clause prohibits as civil actions before any court. It follows that the intent of the clause, read as a whole, is to vest in the arbitration process everything that is prohibited from the court process.

A class action is plainly one of the possible forms of civil action that could be brought in a court concerning a dispute arising under this Agreement. In fact, a class action in court is just what Dr. Sutter commenced in the first place.

Therefore, because all that is prohibited by the first part of the clause is vested in arbitration by its second part, I find that the arbitration clause must have been intended to authorize class actions in arbitration. Indeed, to avoid a finding that such was the parties' intention, it would be necessary for there to be an express exception for class actions in the prohibition. Such a carve-out cannot be inferred absent some clear manifestation of such intent. Similarly, that class actions in court are absolutely prohibited by the first part of the clause but are at the same time not allowed under the second part would mean that class actions are not possible in any forum. In my view, that reading cannot be inferred in the absence of a clear expression that such a bizarre result was intended.

Accordingly, I find that, on its face, the arbitration clause in the Agreement expresses the parties' intent that class action arbitration can be maintained.

In addition, I note that, since Oxford successfully invoked the arbitration clause to prohibit a class action in court, it ought to be bound by judicial estoppel from arguing in this arbitration that the class action part of the case is not governed by the "and all such disputes [including the class action it has just successfully had stopped] shall be submitted to final and binding arbitration" clause.

Since I do not find that the clause is ambiguous, it is not necessary to pass on the *contra proferentem* arguments.

The Agreement as a Whole

It remains to discuss Oxford's arguments that the agreement read as a whole limits the possible interpretation of the arbitration clause to eliminate class actions. While Oxford notes correctly that the Agreement must be viewed as a whole, I do not find persuasive its contentions that other provisions of the Agreement undermine what appears to be facially allowed by the arbitration clause.

Oxford notes, for example, that the parties to the agreement are only Dr. Sutter and Oxford. The contract repeatedly refers to those parties as Oxford, on the one hand, and the "Primary Care Physician," "his/her" or "he/she" on the other hand. Paragraph after paragraph, Oxford notes, the contract defines the duties and obligations of each party, without a single reference to any other physician or health care provider.

This argument is not persuasive. Every contract, except one that expressly refers to class arbitration, will necessarily deal only with the parties to the particular contract. It can be noted that similar language in the contracts in the *Green Tree* case did not cause any of the lower courts, or the Supreme Court, to conclude as a matter of law that the parties thereby intended to preclude class arbitration. Indeed, the whole argument seems to me to be beside the point. In a class arbitration, the members of the class are not necessarily parties to the same contract; rather, they have similar or identical contracts with the same defendant that raise the same or similar issues. The references in the Agreement to individual parties, accordingly, have no bearing on whether this Agreement allows class arbitrations.

The ADR Clause in the Agreement

The Agreement contains, in addition to the arbitration clause discussed above, an ADR clause that allows for adjustment of certain disputes within a procedure maintained internally by Oxford. Oxford also argues that the ADR clause requires that, before Dr. Sutter may pursue arbitration, he must attempt to resolve his dispute through this ADR process.

Oxford notes that the ADR procedure is mandated by New Jersey law to provide a mechanism for providers to resolve disputes on payment of claims arising from individual contracts. In 2001, Oxford updated its Provider Reference Manual to provide the mandated ADR process for the reviews and appeals set forth in these regulations.

Oxford argues that to allow class arbitration to dispense with this individual internal dispute resolution mechanism would subvert the entire statutory scheme. Interpreting the contract to provide for "class arbitration," Oxford argues, would be fundamentally inconsistent with New Jersey law and regulations.

Finally Oxford argues that the explicit terms of the contract permit arbitration only for physicians who have exhausted their disputes through this ADR grievance procedure. This language alone, it argues, precludes "class arbitration" on behalf of all New Jersey Oxford-affiliated physicians, many thousands of whom have never asserted a grievance, let alone exhausted this contractually mandated procedure.

I do not accept Oxford's arguments. With respect to the situation of Dr. Sutter himself, the parties' failure to raise this issue throughout the court proceedings prior to this arbitration indicates that they interpret the ADR clause as not being a condition precedent. Moreover, their failure to raise it as a bar it seems to me to amount to a waiver.

I interpret the reference at the end of the ADR clause that "Any complaint or grievance which at the end of [the ADR] process is not resolved ... may be submitted to arbitration pursuant to [the arbitration clause] to mean just what it says. The ADR process is non-binding; it may or may not result in a resolution of a dispute. If it does not, the provider is free to pursue arbitration. I thus interpret the ADR procedure as an alternative, that the provider can pursue if he chooses, and his use of the ADR procedure does not preclude arbitration if he does not like the ADR result. It is not meant to be a condition precedent to arbitration. Similarly, the ADR clause is found at the end of the Agreement, unattached to the arbitration clause. Contracts that mandate ADR before arbitration typically structure the progression from negotiation to mediation to arbitration in a single clause.

Dr. Sutter's brief refers to the extensive discussion of the same ADR clause by the New Jersey court in connection with a class action against another insurer. Oxford notes correctly that that agreement in that case does not involve arbitration. Nevertheless, the court's analysis of the purpose and application of the ADR clause is consistent with the reading adopted here that this clause is essentially for the benefit of the provider and is not to be used as a condition precedent.

Accordingly, I find that the ADR clause has no current application to Dr. Sutter. As to other members of the class or classes the bearing the ADR clause may have will be one of the issues in administration of the class action. I am making no finding about the same at this point. That issue, as all others relating to the actual class action, are reserved to be decided in further appropriate proceedings.

Rules of the AAA

Finally, Oxford says that the reference in the arbitration clause to the rules of the American Arbitration Association negate class actions. I disagree. The current AAA rules are silent on the question of class actions. The procedures on consolidation address issues different from those presented by class actions. Consolidations are imposed, by courts, and under special AAA procedures, for reasons unique to each case. These can include efficiency and the avoidance of inconsistent results. While consolidations are imposed, a class action always provides the class members the opportunity to opt out of the proceedings. I therefore conclude that the reference to AAA procedures in the Agreement is not inconsistent with maintaining this case as a class action.

Conclusion

For the foregoing reasons this case shall be maintained as a class action.

This determination does not in any way decide any of the issues relating to the class action itself, such as the definition of the class or classes, the form of notice to class members and similar matters. Nor does it reflect any views on the merits of the underlying case. It was originally agreed with the parties that consideration of all such matters would be deferred until it was first concluded that this case would or would not be maintained as a class action.

A status conference will be scheduled promptly to address what further proceedings will be required.

It is so ordered.

/s/ W.L.D. Barrett

September 23, 2003

W.L.D. Barrett, Arbitrator

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-5223

JOHN IVAN SUTTER, M.D., *Appellee*,

v.

OXFORD HEALTH PLANS LLC, *Appellant*.

Submitted pursuant to Third Circuit
L.A.R. 34.1(a) June 30, 2006

Filed February 28, 2007

Before: BARRY, VAN ANTWERPEN and JOHN R. GIBSON,* Circuit Judges.

OPINION OF THE COURT

JOHN R. GIBSON, Senior Circuit Judge:

This is an appeal from a denial of a motion to vacate an arbitration award. Oxford Health Plans LLC appeals the arbitrator's partial final class determination award certifying a class action in a dispute between Oxford and John Ivan Sutter, M.D. Oxford argues that the District Court erred in the standard of review used to analyze the arbitrator's decision and erred in concluding that the arbitrator did not exceed his powers or manifestly disregard the law. For the following reasons, we affirm the decision by the District Court.

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* The Honorable John R. Gibson, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit.

Sutter is a New Jersey pediatrician and on April 12, 2002, filed a class action complaint against Oxford and other health insurers in the Superior Court of New Jersey. The case was severed as to each defendant, and on October 25, 2002, the New Jersey Superior Court granted Oxford's motion to compel arbitration. Sutter's cases against three of the insurers, Cigna, United Healthcare, and HealthNet, were removed to federal court and transferred to a Multi-District Litigation in the Southern District of Florida as "Provider Track Tag-Along" actions. It was regarding this related dispute that the Eleventh Circuit issued its opinion in *Klay v. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081, 125 S.Ct. 877, 160 L.Ed.2d 825 (2005).

On December 11, 2002, Sutter and Oxford began arbitration before a single arbitrator, William L.D. Barrett. In the dispute between Sutter and the health carriers, Sutter alleged that the carriers failed to pay medical claims timely and correctly under New Jersey law. Specifically, Sutter argued that the carriers did the following: (1) failed to make prompt and timely payment of medical claims; (2) refused to provide compensation for procedures performed by improperly "bundling" them with other procedures; (3) reduced payments by changing or "downcoding" claims to reflect less expensive procedures; and (4) refused to provide appropriate compensation where additional medical services are required-known as the refusal to recognize "modifiers." In the arbitration with Oxford, Sutter sought class certification so as to represent all physicians who provided services to any person covered by Oxford during a specific eight-year period. On March 25, 2005, Barrett issued a partial final class determination award, where he defined the class of claimants and certified the class. On April 25, 2005, Oxford filed a motion in the United States District Court for the District of New Jersey to vacate the arbitration award together with a motion to stay pending transfer, both of which the District Court denied. Oxford now brings the present appeal.

I.

We review a district court's ruling on a motion to vacate an arbitration award *de novo*. *See Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503, 1509 (3d Cir. 1994). As a threshold matter, Oxford argues that the District Court used the wrong standard of review in deciding Oxford's motion to vacate. Normally, our review of arbitration awards is "extremely deferential." *Dluhos v. Strasberg*, 321 F.3d 365, 370 (3d Cir. 2003). Parties, however, may agree to vacatur standards other than those specified in the Federal Arbitration Act ("FAA"). *Roadway Package Sys. Inc. v. Kayser*, 257 F.3d 287, 293 (3d Cir. 2001). In order for a court to recognize a standard other than that specified in the FAA, the parties must manifest a clear intent. *Id.*

In the instant case, the agreement between Sutter and Oxford specified that all disputes "shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association." The American Arbitration Association's Supplementary Rules for Class Arbitrations ("AAA Rules") allow for "judicial review" within 30 days of a class determination award. The AAA Rules also require that class determinations be set forth in a "reasoned, partial final award." Oxford argues that, "[a]s a matter of logic, these rules envision *de novo* review at least as to whether proper legal standards have been applied and followed." (Appellant's Brief at 23).

Oxford's argument is not persuasive. While the AAA Rules call for judicial review, they never specify what standard of review the courts should use. Considering the silence of the AAA Rules on this issue, we are unable to conclude that the parties manifested a clear intent to opt out of the FAA rules. *See Roadway*, 257 F.3d at 293. ("We do not believe that [an arbitration clause and a generic choice of law clause] demonstrate a clear intent to displace the FAA's vacatur standards and replace them with ones borrowed from Pennsylvania law."); *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995) ("At most, the choice-of-law clause introduces an ambiguity into an arbitration agreement that would otherwise allow punitive damages awards."). We therefore conclude that the District Court did not err in applying a highly deferential standard of review.

II.

Oxford argues that the arbitrator's award both exceeded his authority and was a manifest disregard of the law by failing to perform the required predominance analysis and by allowing Sutter to relitigate already decided issues. When determining whether an arbitrator exceeded his authority, we have used a two-step process: (1) we must be able to rationally derive the form of the award either from the agreement between the parties or from their submissions to the arbitrators, and (2) the terms of the arbitral award must not be completely irrational. *Mut. Fire, Marine & Inland Ins. Co. v. Norad Reinsurance Co.*, 868 F.2d 52, 56 (3d Cir. 1989). Similarly, an award may not be vacated simply because the arbitrator made an error of law, but only because "the arbitrator's decision evidences manifest disregard for the law." *Local 863 Int'l Bhd. of Teamsters v. Jersey Coast Egg Producers, Inc.*, 773 F.2d 530, 533 (3d Cir. 1985).

Here, the arbitrator neither exceeded his authority nor evidenced manifest disregard for the law. The arbitrator individually went through each requirement for a class action set forth in Rule 4 of the AAA Rules. He examined the effect of the *Klay* decision at length before deciding that it was not directly applicable to the present case. Finally, he analyzed the issue of collateral estoppel and provided extensive reasoning for why it was not applicable. Reviewing the arbitrator's decision, there is no basis for determining that the decision was irrational or evidenced manifest disregard for the law.

We AFFIRM the judgment of the District Court.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 05-2198 (JAG)

JOHN IVAN SUTTER, M.D., *Plaintiff*,
v.
OXFORD HEALTH PLANS LLC, *Defendant*.

October 28, 2005, Decided
October 31, 2005, Filed

MEMORANDUM OPINION

GREENAWAY, JR., U.S.D.J.

This matter comes before the Court on the Motion to Vacate an Arbitration Award by Oxford Health Plans, LLC ("Oxford"), the Motion for Stay Pending Transfer by Oxford, and the Cross-Motion to Dismiss by John Ivan Sutter, M.D. ("Sutter"), pursuant to the Federal Arbitration Act ("F.A.A."), 9 U.S.C. § 10. For the reasons set forth below, each of these Motions will be denied.

INTRODUCTION

On April 12, 2002, Sutter filed a class action complaint against Oxford and other health insurers in the Superior Court of New Jersey, alleging breach of provider agreements with putative class members in regard to payment of claims, as well as other violations of New Jersey law. Subsequently, the cases were severed as to each defendant. On October 25, 2002, the New Jersey Superior Court granted Oxford's motion to compel arbitration. On December 11, 2002, Sutter and Oxford began arbitration before a single arbitrator, William L.D. Barrett ("Barrett"). On September 23, 2003, the arbitrator rendered a decision in which he concluded that the arbitration clause in the parties' agreement authorized class action arbitration. On March 25, 2005, following the conclusion of discovery, briefing, and oral argument, the arbitrator issued the "Partial Final Class Determination Award" ("Award"). In this Award, which expressly incorporated the 2003 decision, Barrett defined the class of claimants and then certified the class.

On April 25, 2005, Oxford filed the instant Motion to Vacate the Arbitration Award as well as the Motion for Stay Pending Transfer. Oxford stated that it had concurrently filed a "Notice of Potential Tag Along" with the Judicial Panel on Multidistrict Litigation, seeking transfer of this action to the Southern District of Florida for coordination with In Re Managed Care Litigation, MDL No. 1334, pending before that district's court. On May 9, Sutter filed a Cross-Motion to Dismiss under FED. R. CIV. P. 12(b)(1) and 12(b)(6).

ANALYSIS

I. Governing Legal Standards

A. Standard for a Motion to Vacate an Arbitration Award

The Third Circuit restated the highly deferential standard for review of arbitration award decisions in *Hruban v. Steinman*, 40 Fed. Appx. 723 (3d Cir. 2002):

> The grounds upon which this Court may vacate an arbitration award are "narrow in the extreme." ... It is not the proper role of the court to "sit as the [arbitration] panel did and reexamine the evidence under the guise of determining whether the arbitrators exceeded their powers."

Id.

Under the F.A.A., 9 U.S.C. § 10(a)(4), a court may grant vacatur of an arbitration award if, *inter alia*, the arbitrator exceeded his powers. The Third Circuit also recognizes a judicially-created, non-statutory ground for vacatur, i.e., that the arbitrator displayed a manifest disregard of the law.

The Third Circuit has stated this test for whether an arbitrator has exceeded his powers:

> To determine whether arbitrators exceeded their powers, this Court has employed a two-step analysis: (a) the form of the award must be rationally derived either from the agreement between the parties or from the parties' submission to the arbitrators, and (b) the terms of the award must not be "completely irrational."

Hruban, 40 Fed. Appx. at 724. Arbitrators exceed their powers when the award, or some aspect of it, has no rational basis. *Brentwood Med. Assocs. v. UMW*, 396 F.3d 237, 242 (3d Cir. 2005). In addition, there is a presumption that the arbitrator acted within the scope of his or her authority, and "a court may conclude that an arbitrator exceeded his or her authority [only] when it is obvious from the written opinion." *Roadway*

Package Sys. v. Kayser, 257 F.3d 287, 301 (3d Cir. 2001).

As to the standard for manifest disregard of the law, the Third Circuit has held that courts making such a determination "generally ... affirm easily the arbitration award." *Dluhos v. Strasberg*, 321 F.3d 365, 370 (3d Cir. 2003). The Third Circuit has not articulated a test in detail, but has characterized it as "a manifest disregard for the law rather than an erroneous interpretation of the law." Id. In determining whether an arbitrator acted with manifest disregard for the law, most circuits apply this test: "(1) the arbitrator knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrator was well-defined, explicit and clearly applicable to the case." *George Watts & Son v. Tiffany & Co.*, 248 F.3d 577, 581-2 (7th Cir. 2001) (Williams, J., concurring). *See also Brabham v. A.G. Edwards & Sons, Inc.*, 376 F.3d 377, 382 (5th Cir. 2004) (applying this test). The Eighth Circuit's application of this test requires that the arbitration panel cite the relevant law and then proceed to ignore it. *St. John's Mercy Med. Ctr. v. Delfino*, 414 F.3d 882, 884 (8th Cir. 2005). Moreover, the Second Circuit holds that "under the test of manifest disregard [the arbitrator] is ordinarily assumed to be a blank slate unless educated in the law by the parties." *Goldman v. Architectural Iron Co.*, 306 F.3d 1214, 1216 (2nd Cir. 2002).

II. Subject Matter Jurisdiction

Sutter argues that this Court lacks subject matter jurisdiction. In the Motion to Dismiss Oxford's Motions to Vacate and Stay, Sutter attacks the three grounds for jurisdiction asserted by Oxford: diversity, federal question, and statutory, under the Class Action

Fairness Act of 2005, 28 U.S.C. § 1332(d)(2). Because this Court determines that it has diversity jurisdiction over Oxford's motions, it need not reach the issues of federal question and statutory jurisdiction.

"It is now well established that § 10 of the FAA does not constitute a grant of subject matter jurisdiction. There must be an independent basis of federal jurisdiction before a district court can entertain a motion to vacate under that section. The petitioning party must demonstrate that diversity or federal question jurisdiction exists." *Minor v. Prudential Sec.*, 94 F.3d 1103, 1104-5 (7th Cir. 1996). *See also Baltin v. Alaron Trading Corp.*, 128 F.3d 1466, 1471 (11th Cir. 1997) (observing the "long line of decisions holding that section 10 does not confer subject matter jurisdiction on federal courts").

This Court is granted diversity jurisdiction by 28 U.S.C. § 1332(a). The parties do not dispute that they are of diverse citizenship: Sutter is a citizen of New Jersey and Oxford is a citizen of Minnesota. They dispute only whether the $ 75,000 amount in controversy requirement of § 1332(a) has been met.

Sutter argues that the threshold is not met because Dr. Sutter's potential damages do not exceed the minimum. This argument fails because the controversy here is defined by Oxford's motion to vacate—not by the underlying dispute in arbitration. The Seventh Circuit examined relevant cases and made the clearest statement of this principle in *Minor*, 94 F.3d at 1106: "A strong body of caselaw has developed, however, holding that the nature of the underlying dispute is irrelevant for purposes of subject matter jurisdiction."

The Sixth Circuit agreed in *Ford v. Hamilton Inv.*, 29 F.3d 255, 260 (6th Cir. 1994). In *Ford*, the court began by noting that "the general federal rule has long been to decide what the amount in controversy is from the complaint itself." *Id.* (internal citation omitted). It then looked to the face of the application for vacatur of the arbitration award filed with the district court, and found that it sought to vacate an award that was under the minimum jurisdictional amount. *Id.* See also *Baltin*, 128 F.3d at 1472 (amount in controversy defined by amount of arbitration award petitioner sought to vacate).

Thus, this Court looks not to the amount in controversy in the underlying arbitration, but to the amount of the award stated by Oxford in its application for the motion to vacate. Oxford alleges that the total amount in controversy exceeds $ 5,000,000, which Sutter does not dispute. "It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289, 58 S. Ct. 586, 82 L. Ed. 845 (1938). As Sutter has not questioned Oxford's $ 5,000,000 figure, and this Court discerns no basis to conclude to a legal certainty that the claim is really for less than $ 75,000, the amount in controversy requirement of § 1332(a) is satisfied. This Court has subject matter jurisdiction over this matter.

In post-briefing letters, the parties debated the application of the recently decided *Exxon Mobil Corp. v. Allapattah Servs.*, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005) to the analysis of diversity jurisdiction in this case. This Court need not address this matter: *Exxon Mobil* addressed a different procedural context, one not involving a district court's review of arbitration awards which, as discussed above, requires another approach to the analysis of subject matter jurisdiction.

III. Oxford's Motion to Vacate the Arbitration Award

As a threshold matter, Sutter argues that the two decisions of the arbitrator are interlocutory, not final, and that the F.A.A. restricts a district court's review to final decisions only. Oxford responds with two arguments: 1) The arbitrator titled the award the "Partial *Final* Class Determination *Award* of Arbitrator"; and 2) the F.A.A. allows parties to an arbitration to set their own standards for vacatur, which the parties have done in consenting to the AAA Class Supplementary Rules, which allow a motion to vacate this Award.

In *Roadway*, 257 F.3d at 293, the Third Circuit held that "parties may opt out of the FAA's off-the-rack vacatur standards and fashion their own." The question, under *Roadway*, is whether the parties manifested a "clear intent" to do so. *Id.* Sutter argues that Oxford has proffered no extrinsic evidence of such intent to allow review of this Award. This is not the case. Oxford has proffered persuasive evidence of a clear intent to adopt review standards that differ from the F.A.A., allowing review at this stage of the arbitration. The Award states: "The parties agreed in 2004 that the [AAA Supplementary Rules for Class Arbitrations] would govern the future proceedings in this case, including the class determination matters decided in this award." (De Leeuw Decl. Ex. A 2.) Rule 5(d) of the AAA Supplementary Rules provides: "The arbitrator shall stay all proceedings following the issuance of the Class determination Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Class Determination Award." (De Leeuw Decl. Ex. G 2.) In accord with this provision, the Arbitrator oncluded the Award with this statement: "as required y the Rules, all proceedings in this arbitration are tayed for thirty days from the date of this award. If he parties proceed to the courts, this stay can be xtended as appropriate, either by me or by the ourts." (De Leeuw Decl. Ex. A 14.) Thus, the Award ppears to have been issued in conformity with Rule (d) of the AAA Supplementary Rules, and these rules rant Oxford the right to come to court to move to acate the award at this time.

Crucially, Sutter does not claim that it never greed to the AAA Supplementary Rules. This Court oncludes that the parties have demonstrated a clear tent to fashion standards which differ from those set ut in the F.A.A.; these standards expressly grant xford the right to move to vacate this Award.

Having determined that this Court has subject atter jurisdiction over this case, and that judicial eview of the Award is appropriate, this Court turns to e merits of Oxford's Motion to Vacate the Arbitration ward. Oxford argues that the arbitrator rendered wo decisions in which he exceeded his powers and anifestly disregarded the applicable law: the 2003 ecision on contract interpretation, and the 2005 ecision on class certification which incorporated it.

Oxford asks that this Court conduct a *de novo* eview of the Award. Oxford argues that, as *Roadway* ecognizes the right of parties to fashion their own andards, the parties here have fashioned their own andard of review for the district court: the AAA upplementary Rules change the district court's andard of review to *de novo*. Oxford, however, verlooks *Roadway*'s requirement that the parties manifest a "clear intent" to do so.[1] *Roadway*, 257 F.3d at 293. Oxford does not argue that the Supplementary Rules evidence a clear intent to change the standard of review. Nor does any intent to do so—no less clear intent—appear on the face of the Supplementary Rules. Provision 5(d), which, as discussed above, grants the parties the right to seek judicial review of this Award, says nothing to characterize the standard of review. (De Leeuw Decl. Ex. G 2.) The absence of any statement about how the district court should conduct judicial review supports a finding that no clear intent to change the standard of review has been manifested.

Oxford makes four arguments that the arbitrator exceeded his powers and manifestly disregarded the law.

A. The Arbitrator Disregarded Green Tree

Oxford claims that, in making the award, the arbitrator ignored the Supreme Court's holding in *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003), which requires him to construe the contract to determine whether class arbitration is permissible. Oxford argues that his decision to allow class arbitration contradicts contractual provisions making it impermissible. This argument is insufficient to state a valid claim that the arbitrator exceeded his powers. Oxford does not assert that this decision is completely irrational. Rather, its boldest claim is that "the arbitrator's reasoning is directly contradictory to ... *Green Tree*." (Oxf. Mem.

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[1] Moreover, the Third Circuit has expressly opposed the position Oxford advocates: "it is our duty to resist the urge to conduct de novo review of the award on the merits." *Brentwood Med. Assocs. v. UMW*, 396 F.3d 237, 241 (3d Cir. 2005).

Supp. Mot. Vac. 19). This fails to state a valid claim that the decision has no rational basis or is completely irrational.

Oxford next argues that the arbitrator manifestly disregarded the law in deciding to allow class arbitration. Examination of the Award, in the light of *Green Tree*, shows that there is no basis for this argument. *Green Tree* involved a case in which an arbitrator certified a class in arbitration. The trial court confirmed the award, and *Green Tree* appealed, arguing that class certification was contractually impermissible. The Supreme Court accepted *Green Tree*'s claim that class certification was imposed on the parties by a court, not by the arbitrator, and remanded the case with the order that the arbitrator, not the courts, should decide the question of class certification by interpreting the contract.

There are two reasons to conclude that, here, the arbitrator did not manifestly disregard *Green Tree*. First, *Green Tree* is distinguishable on its facts. Here, arbitrator Barrett conducted arbitration proceedings and made the determination to certify a class; he did not certify based only on a court's order. But, more importantly, arbitrator Barrett's decision relies on *Green Tree* and conforms to its holding. *Green Tree* holds that the arbitrator must interpret the contract to determine whether class certification is permissible under its terms. On September 23, 2003, Barrett issued an 8-page decision (the "2003 Decision") concluding that the case will be maintained as a class action. (De Leeuw Decl. Ex. A 15-22.) In this decision, Barrett began by observing that he had stayed arbitration proceedings so that the *Green Tree* decision could be received and analyzed. (De Leeuw Decl. Ex. A 16.) The parties agreed that, under *Green Tree*, Barrett must determine whether the parties' agreement allows for class action arbitration. (*Id.*) Barrett began his discussion by examining the holding of *Green Tree*. (*Id.* at 16-17.) He observed that, under *Green Tree*, he must determine whether the parties' agreement allowed for class action arbitration. (*Id.* at 16.) He proceeded to perform a detailed analysis and interpretation of the agreement, concluding that "the arbitration clause in the Agreement expresses the parties' intent that class action arbitration can be maintained." (*Id.* at 19.) The March 24, 2005 Award incorporates this decision. (*Id.* at 2.) Thus, Barrett did exactly what the Supreme Court said in *Green Tree* an arbitrator must do: interpret the agreement to determine whether the contract permits class certification. Barrett knew about and followed the law. The Award does not support a claim that he disregarded or ignored it.

Moreover, in *Green Tree*, the Supreme Court did not instruct on the method the arbitrator must use in interpreting the contract. To the contrary, the Court held that interpretation of the arbitration agreement "should be for the arbitrator, not the courts, to decide." *Green Tree*, 539 U.S. at 453. Oxford, in seeking that this Court impose a contract interpretation on the arbitrator, asks this Court to do what *Green Tree* says it should not do.

Oxford's argument boils down to a disagreement with Barrett's interpretation of the agreement, cloaked in the incorrect assertion that Barrett disregarded the Supreme Court. This Court will not conduct *de novo* review of the arbitrator's interpretation of the agreement. Under the deferential standard of review that this Court must follow, Barrett's interpretation is reasoned and rational. Oxford has not shown how the interpretation ignores or refuses to apply a clearly applicable rule of law.

Oxford next argues that Barrett disregarded New Jersey law and exceeded his powers by ignoring the parties' intent, as reflected in the contract. This simply repeats the argument that Barrett interpreted the contract incorrectly, and is legally insufficient to state a claim. Oxford neither alleges that the contract interpretation is irrational, nor that the arbitrator ignored a clearly applicable legal principle. The Award relies on the legal principle that Oxford states, that New Jersey requires enforcement of the parties' shared intent as evidenced in the contract. As discussed above, Barrett based his decision to allow class action arbitration on an interpretation of the contract performed so as to enforce the parties' shared intent. Oxford's argument is defeated by the plain language of the 2003 Decision.

B. The Arbitrator Disregarded *Klay*

Oxford next argues that the arbitrator disregarded the decision in *Klay v. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004), cert. denied, 125 S.Ct. 877, 160 L. Ed. 2d 825 (2005). In so doing, Oxford makes lengthy arguments that lead this Court through *de novo* review of the Award. Following the guidance of the Third Circuit in *Brentwood*, 396 F.3d at 241, this Court will resist Oxford's urging to do so. Instead, this Court shall evaluate Oxford's argument under the "manifest disregard for the law" standard, and finds it has no merit. Barrett devoted three pages of the Award decision to discussion of the application of *Klay*. (De Leeuw Decl. Ex. A 3-5.) Rather than ignoring *Klay*, Barrett paid careful attention to it: "[*Klay*] cannot be disregarded. Mindful of this principle, I have read and re-read the *Klay* opinion. After careful consideration, I cannot agree with Oxford that it applies to this case as controlling precedent." (*Id.* at 4.) Barrett next explained in detail why he concluded that it was inapplicable to the facts of this case. This Court finds no basis to conclude that the arbitrator manifestly disregarded *Klay*.

As noted by Barrett, Oxford argues that *Klay* is binding precedent for the arbitrator. Yet Oxford does not explain how an Eleventh Circuit decision has binding authority in this New Jersey arbitration. Oxford has not shown how *Klay* is clearly applicable law so as to satisfy that element of the manifest disregard standard.

Oxford also argues that *Klay* should control under the doctrine of collateral estoppel, as Sutter was a party in *Klay*. Again, however, Barrett did not manifestly disregard the doctrine of collateral estoppel. Rather, he expressly discussed the doctrine and provided a reasoned explanation for why he concluded that the doctrine did not apply. (De Leeuw Decl. Ex. A 5-6.) Again, this Court will not conduct a *de novo* review of Barrett's decision on this issue. Barrett stated that, under New Jersey law, collateral estoppel is an equitable doctrine, requiring a judgment of fairness. (De Leeuw Decl. Ex. A 6.) Oxford does not dispute that this is a correct statement of applicable law. Barrett made an equitable determination and explained his reasoning. (Id.) As Barrett did not manifestly disregard either *Klay* or the law of collateral estoppel, Oxford's argument has no merit.

C. The Arbitrator Failed to Perform the Required Predominance Analysis

Oxford next argues that the arbitrator manifestly disregarded the law and exceeded his powers by refusing to perform the predominance analysis required by AAA Supplementary Class Rules 4(b) and 5(a). This argument rests on Oxford's mischaracterization of 4(b), which states: "An arbitration may be maintained as a class arbitration if the prerequisites of subdivision (a) are satisfied, and in addition, the arbitrator finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members ..." (De Leeuw Decl. Ex. G 2.) Oxford argues that 4(b) requires the arbitrator to identify the individual issues and weigh them against the common issue, but that reading is contrary to the plain language of the rule. The rule requires the arbitrator to make a finding that common questions predominate, not to state a particular predominance analysis. In the Award, Barrett specifically addressed the requirements of Rule 4(b), articulating his finding that common questions predominate and laying out the reasons for this determination. (De Leeuw Decl. Ex. A 11-12.)

Rule 5(a) does not help Oxford either: "The arbitrator's determination concerning whether an arbitration should proceed as a class arbitration shall be set forth in a reasoned, partial final award ... which shall address each of the matters set forth in Rule 4." (De Leeuw Decl. Ex. G 2.) Again, Barrett followed this mandate. He articulated the reasoning for his determination that common questions predominated and addressed each of the matters set forth in Rule 4. (De Leeuw Decl. Ex. A 11-12.) Rather than disregarding either Rules 4(b) or 5(a), Barrett followed them to the letter. There is no basis for this Court to conclude that the arbitrator disregarded the pertinent mandates.

D. The Arbitrator Disregarded *Sutter v. Horizon*

Lastly, Oxford argues that the arbitrator exceeded his powers and disregarded the law by refusing to follow the New Jersey Superior Court case of *Sutter v. Horizon Blue Cross*, No. L-3685-02 (N.J. Super. Ct. 2004), in which, it alleges, the court denied class certification to (the same) Sutter under similar facts. Oxford maintains that the arbitrator should have held that *Horizon*, under the principle of collateral estoppel, bars class certification. As above, Oxford has not even stated a claim that the arbitrator exceeded his powers since it has not alleged that Barrett was completely irrational in this matter. As to manifest disregard of the law, Oxford's argument is unpersuasive. Oxford has not explained how the principle of collateral estoppel was clearly applicable to the case. Moreover, Barrett considered the relevance of *Horizon* and the issue of collateral estoppel, and decided that he had "equitable discretion under New Jersey law not to apply collateral estoppel." (De Leeuw Decl. Ex. A 6.) As discussed above, Oxford has offered no legal basis for this Court to conclude that the arbitrator was even incorrect as to his equitable discretion under New Jersey law, no less that he manifestly disregarded such law. Barrett recognized the law, and provided a rational explanation for why he declined to apply it. (*Id.*) Oxford has not provided a complete argument, no less a persuasive one, that the arbitrator manifestly disregarded the law.

IV. The Parties Remaining Motions are Now Moot

This Court's ruling that Oxford's Motion to Vacate the Arbitration Award is denied renders moot the two remaining motions in this case, Oxford's Motion to Stay Pending Appeal, and Sutter's Cross-Motion to Dismiss. Oxford's Motion to Stay Pending Transfer and Sutter's Cross-Motion to Dismiss are denied on grounds of mootness.

CONCLUSION

For the reasons stated above, Oxford's Motion to Vacate the Arbitration Award is denied. Oxford's Motion for Stay Pending Transfer is denied. Sutter's Cross-Motion to Dismiss is denied.

S/Joseph A. Greenaway, Jr.

JOSEPH A. GREENAWAY, JR., U.S.D.J.

Dated: October 28, 2005

ORDER CLOSED

GREENAWAY, JR., U.S.D.J.

This matter having come before the Court on the Motion to Vacate an Arbitration Award by Oxford Health Plans, LLC ("Oxford"), the Motion for Stay Pending Transfer by Oxford, and the Cross-Motion to Dismiss by John Ivan Sutter, M.D. ("Sutter"), pursuant to the Federal Arbitration Act ("F.A.A."), 9 U.S.C. § 10; and it appearing that this Court reviewed the parties' submissions; and for the reasons set forth in the accompanying Opinion, and good cause appearing, IT IS on this 28th day of October, 2005,

ORDERED that Oxford's Motion to Vacate an Arbitration Award (Docket Entry No. 1) is hereby DENIED; and it is further

ORDERED that Oxford's Motion for Stay Pending Transfer (Docket Entry No. 2) is hereby DENIED; and it is further

ORDERED that Sutter's Cross-Motion to Dismiss (Docket Entry No. 5) is hereby DENIED; and it is further

ORDERED that a copy of this Order be served on the parties within seven (7) days of the entry of this Order.

S/Joseph A. Greenaway, Jr.

JOSEPH A. GREENAWAY, JR., U.S.D.J.

APPENDIX F

AMERICAN ARBITRATION ASSOCIATION
Commercial & Class Action Arbitration Tribunal

In the Matter of the Arbitration between

Re: 18 193 20593 02
John Ivan Sutter, M.D.
VS
Oxford Health Plans, Inc.

PARTIAL FINAL CLASS DETERMINATION AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into between the above-named parties and dated October 25, 2002, contained in a Primary Care Physician Agreement (the "Agreement") between Claimant Dr. Sutter and Respondent Oxford Health Plans, Inc. ("Oxford"'), and having been duly sworn and having duly heard the proofs and allegations of the parties, and for the reasons set forth below, do hereby make this PARTIAL/FINAL AWARD pursuant to Rule 5 of the Supplementary Rules for Class Arbitrations of the American Arbitration Association (the "Rules") as follows:

The Proposed Class

Dr. Sutter proposes to define the class in this arbitration as follows:

> All individual physicians and physician groups (including, but not limited to, medical doctors and doctors of osteopathic medicine), regardless of specialty, who provided services to any person who is a subscriber of; or is insured by, Oxford Health Plans, Inc. ("'Oxford") in the class period of December 11, 1996 through the present.[1]

Prior Proceedings

Dr. Sutter originally began this case as a part of a larger class action case in the Superior Court of Essex County, New Jersey in April 2002. Dr. Sutter, a physician, was seeking from Oxford damages and other relief arising out of allegations that, under the Agreement, Oxford failed to pay claims and reduced payment on claims as a result of Oxford's improper claims processing tactics.

Oxford moved in the Essex County Superior Court to stay Dr. Sutter's civil class action on the ground that the underlying contract between Dr. Sutter and Oxford required that Dr. Sutter's claims be submitted to arbitration. Oxford was successful in its application to the Court. By order dated October 25, 2002, the Court ordered that Dr. Sutter's Amended Complaint be dismissed and that the matters raised should properly be referred to arbitration in accordance with the Agreement.

Dr. Sutter also applied to the Superior Court for an order certifying the case as a class action and determining the class. This motion was denied by order dated November 21, 2002. The Court ordered that all procedural issues including, but not limited to, the determination of class certification, be resolved by the arbitrator.

---

[1] Dr. Sutter filed his class-wide arbitration demand on December 11, 2002. New Jersey's contract statute of limitations is six (6) years. See N.J.S.A. § 2A:14-1.

By agreement of the parties, this case was stayed until the determination of the United States Supreme Court in *Green Tree Financial Corp. et al. v. Bazzle et al.*, which was then pending, could be analyzed.

Thereafter, and before the Rules became effective, the parties briefed and I determined that the arbitration clause in the Agreement allowed for class actions (Memorandum and Order of September 23, 2003, a copy of which is attached to and incorporated into this award as Appendix A).

The parties agreed in 2004 that the Rules would govern the future proceedings in this case, including the class determination matters decided in this award.

After extensive discovery, the class determination issues were briefed and I heard the parties in oral argument at a docketed hearing on October 29, 2004. Based on all of the foregoing, my determination of the class issues is as follows.

Discussion

* * *

PARTIAL/FINAL AWARD

Definition of the Class

For purposes of all further proceedings in this arbitration the class of Claimants is defined and certified as follows:

All individual physicians and physician groups (including, but not limited to, medical doctors and doctors of osteopathic medicine), regardless of specialty, who provided medical services to any person who is a subscriber of, or is a member of a health plan administered by Oxford Health Plans, LLC. ("Oxford") in the class period of December 11, 1996 through December 31, 2004* and who have signed with Oxford a New Jersey provider agreement containing an arbitration clause the same as or similar to that in Dr. Sutter's contract. Excluded from the class are any individual physicians and physician groups (including, but not limited to, medical doctors and doctors of osteopathic medicine) who have executed provider agreements with Oxford that contain a prohibition on class action arbitrations.

The Claim of the Class

The Class alleges that:

> Oxford has uniformly processed the claims for reimbursement submitted by over 16,500 physicians—regardless of the specialty of these doctors—through the use of the same automated software that arbitrarily delays, denies, impedes and reduces compensation for the medical services

---

* Certification of a class of New Jersey physicians and physician groups who provided medical services through December 31, 2004, does not prohibit either party from recovering damages for bills submitted for medical services subsequent to December 31, 2004, as part of the final award in this class arbitration, nor does it prohibit either party from seeking such damages in another arbitration, subject to the limits imposed by the doctrines of res judicata and collateral estoppel.

these doctors provide to members of Oxford's insurance plans.

The centerpiece of this case are the common practices carried out by Oxford's computer system that has been responsible for depriving physicians of proper reimbursement.

This computer system has not processed claims in accordance with the terms of the provider agreements—that is, based on the claims information submitted by the physician and his/her applicable fee reimbursement schedule.

Nor has Oxford's automated, uniform computer programs adjudicated claims in accordance with the requirements of New Jersey's statutory prompt pay laws.

Rather, Oxford's computer system, inter alia, has re-coded, manipulated, eliminated, bundled and downcoded claims submitted by physicians and has then processed these claims to achieve one common, class wide goal—to save Oxford substantial amounts of money and to pay less to doctors in breach of the provider agreements and in violation of the prompt pay statutes.

This has been done in an across-the-board fashion, not based upon any individualized review of claims or medical records for the services provided, but by pre-programmed, arbitrary computer software that has not been based on standard medical or objective coding practices.

The foregoing has damaged the members of the class in amounts to be determined.

lass Representative and Counsel

Dr. Sutter and his counsel are found to be adequate epresentatives of, and capable of protecting, the nterests of the class in this arbitration.

ifurcation for Further Proceedings

When and if it is determined that Oxford breached ts agreements with the members of the class, the issue f sub-classes and suitable further proceedings will be onsidered, and no determination with respect to those natters is being made in this award.

otice

Notice of this arbitration and the method for opting ut of the arbitration shall be given to all members of he class in the Form of Notice attached to and made a art of this Award as Appendix B.

tay

As required by the Rules, all proceedings in this rbitration are stayed for thirty days from the date of his award. If the parties proceed to the courts, this tay can be extended as appropriate, either by me or by he courts.

3/24/05	/s/ William L.D. Barrett
Date	William L.D. Barrett

I, William L.D. Barrett do hereby affirm upon my ath as Arbitrator that I am the individual described in nd who executed this instrument, which is my Award.

3/24/05	/s/ William L.D. Barrett
Date	William L.D. Barrett

[Notary information omitted]

APPENDIX A

[The Memorandum and Order of September 23, 2003 originally attached to and incorporated into the preceding award is reproduced in this booklet as an Exhibit A to APPENDIX C (at page 43a)]

APPENDIX B

[Omitted]

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11-1773

JOHN IVAN SUTTER, M.D.

v.

OXFORD HEALTH PLANS LLC, *Appellant.*

Filed April 30, 2012

SUR PETITION FOR REHEARING EN BANC

Present: McKEE, Chief Judge, SLOVITER, SCIRICA, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, and VANASKIE, Circuit Judges, and *Pogue, Judge

The Petition for Rehearing filed by the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the

---

* Hon. Donald C. Pogue, Chief Judge, United States Court of International Trade, sitting by designation.

Petition for Rehearing by the panel and the Court en banc, is hereby DENIED.

BY THE COURT,

/s/ Julio M. Fuentes
Circuit Judge

DATED: April 30, 2012

MB/cc: Eric D. Katz, Esq.
P. Christine Deruelle, Esq.
Adam N. Saravay, Esq.
Edward Soto, Esq.

APPENDIX H

STATUTORY PROVISIONS

9 U.S.C. § 9—Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

9 U.S.C. § 10—Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

APPENDIX I

OXFORD HEALTH PLANS (NJ), INC.
PRIMARY CARE PHYSICIAN AGREEMENT
SIGNATURE PAGE

IN WITNESS WHEREOF, Primary Care Physician and Oxford Health Plans (NJ), Inc. have executed this PRIMARY CARE PHYSICIAN AGREEMENT as set forth below. This PRIMARY CARE PHYSICIAN AGREEMENT shall be effective on the date it is signed by both parties hereto contingent only upon Primary Care Physician being successfully credentialed by Oxford.

Line of Business	For Oxford Use Only
Primary Care Physician elects to participate in Oxford's Commercial managed care plans, as shown below.	
☒ Commercial/ Freedom Network at the rates shown in Attachment A-1.	☐ Yes ☐ No
☒ Commercial/ Liberty Network at the rates shown in Attachment A-2.	☐ Yes ☐ No
☐ Primary Care Physician elects to participate in Oxford's Medicare program at the rates shown in Attachment A-3.	☐ Yes ☐ No

PRIMARY CARE PHYSICIAN	OXFORD HEALTH PLANS (NJ), INC.
Signed: /s/ John Ivan Sutter	Signed: /s/ Judith A. Norman
Print Name: John Ivan Sutter	Print Name: Judy Roman
Date: 9/14/98	Title: Regional Vice President Medical Delivery Systems
	Date: 9/30/98

For administrative ease and efficiency, Oxford has placed the Signature Page of this PRIMARY CARE PHYSICIAN AGREEMENT at the front rather than at the back page of this document.

OXFORD HEALTH PLANS (NJ), INC.

PRIMARY CARE PHYSICIAN AGREEMENT

This agreement ("Agreement") sets forth the terms whereby Primary Care Physician will treat members of Oxford's medical plans ("Members").

1. Health Services. Primary Care Physician agrees to provide to Oxford Members("Members") who select Primary Care Physician all medically necessary primary care health services which Members are entitled to receive under their Oxford Certificate of Coverage or Member Handbook ("Covered Services"), which Primary Care Physician is qualified to provide. Primary Care Physician shall have the primary responsibility for providing and coordinating the overall health care of each of his/her Members, including appropriate referrals to Consultant Physicians, Hospitals and other providers in Oxford's network. Primary Care Physician agrees to comply with all Oxford's credentializing/recredentializing, administrative, patient referral, utilization review, quality assurance and reimbursement procedures as may be adopted by Oxford from time to time. Primary Care Physician shall make arrangements to assure the availability of coverage for physician services to his/her Members on 24 hours per day, 7 days per week basis. Primary Care Physician agrees not to differentiate or discriminate in the treatment of his/her patients on the basis of race, sex, age, religion, place of residence health status or source of payment, including Medicare and Medicaid, and to observe, protect and promote the rights of Members as patients.

* * *

9. Interpretation. This Agreement shall be governed in all respects by New Jersey law. Oxford may modify any provision of this Agreement upon written notice to Primary Care Physician. Oxford may assign this Agreement, in whole or in part, without notice. The invalidity or unenforceability of any term or condition of this Agreement shall not affect the validity or enforceability of any other term or provision. The waiver by either party of a breach or violation of any provision of this Agreement shall not operate as or be construed to be a waiver of any subsequent breach hereof. All material changes to this agreement must receive prior approval from the New Jersey Departments of Health and Senior Services and Banking and Insurance, and, with regard to the Hold Harmless and the Post-Termination provisions, must receive the additional prior approval of the Health Care Financing Administration.

* * *

11. Arbitration. No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association with one arbitrator. All costs and expenses of the arbitration, including actual attorney's fees, shall be allocated among the parties to this Agreement according to the arbitrator's discretion. The arbitrator's award may be confirmed and entered as a final judgment in any court of competent jurisdiction and enforced accordingly. Proceeding to arbitration and obtaining an award thereunder shall be a condition precedent to the bringing or maintaining of any action in any court with respect to any dispute arising under this Agreement, except for the institution

of a civil action to maintain the status quo during the pendency of any arbitration proceeding.

* * *

14. Defined Terms. The term "Oxford" as used herein shall mean Oxford Health Plans (NJ), Inc. or any affiliate or subsidiary of Oxford Health Plans, Inc., including but not limited to Oxford Health Insurance Inc., which offers, administers or provides health services. The term "Member" shall mean any individual who has entered into, or for whom an employer or other entity has entered into on his/her behalf, a contractual relationship with Oxford to receive "Covered Services." "Covered Services" shall mean health care services and supplies within the scope of a Member's plan of benefits, subject, in some cases, to precertification and other medical management protocols. "Approved Charges" are the amounts due to Primary Care Physician from Oxford for the provision of covered Services which have been delivered in compliance with all required precertifications and medical management protocols.

* * *

APPENDIX J

American Arbitration Association Supplementary Rules for Class Arbitrations

Rules Effective October 8, 2003
Fees Effective January 1, 2010

1. Applicability

(a) These Supplementary Rules for Class Arbitrations ("Supplementary Rules") shall apply to any dispute arising out of an agreement that provides for arbitration pursuant to any of the rules of the American Arbitration Association ("AAA") where a party submits a dispute to arbitration on behalf of or against a class or purported class, and shall supplement any other applicable AAA rules. These Supplementary Rules shall also apply whenever a court refers a matter pleaded as a class action to the AAA for administration, or when a party to a pending AAA arbitration asserts new claims on behalf of or against a class or purported class.

(b) Where inconsistencies exist between these Supplementary Rules and other AAA rules that apply to the dispute, these Supplementary Rules will govern. The arbitrator shall have the authority to resolve any inconsistency between any agreement of the parties and these Supplementary Rules, and in doing so shall endeavor to avoid any prejudice to the interests of absent members of a class or purported class.

(c) Whenever a court has, by order, addressed and resolved any matter that would otherwise be decided by an arbitrator under these Supplementary Rules, the arbitrator shall follow the order of the court.

* * *

3. Construction of the Arbitration Clause

Upon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the "Clause Construction Award"). The arbitrator shall stay all proceedings following the issuance of the Clause Construction Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Clause Construction Award. Once all parties inform the arbitrator in writing during the period of the stay that they do not intend to seek judicial review of the Clause Construction Award, or once the requisite time period expires without any party having informed the arbitrator that it has done so, the arbitrator may proceed with the arbitration on the basis stated in the Clause Construction Award. If any party informs the arbitrator within the period provided that it has sought judicial review, the arbitrator may stay further proceedings, or some part of them, until the arbitrator is informed of the ruling of the court.

In construing the applicable arbitration clause, the arbitrator shall not consider the existence of these Supplementary Rules, or any other AAA rules, to be a factor either in favor of or against permitting the arbitration to proceed on a class basis.

4. Class Certification

(a) Prerequisites to a Class Arbitration

If the arbitrator is satisfied that the arbitration clause permits the arbitration to proceed as a class arbitration, as provided in Rule 3, or where a court has ordered that an arbitrator determine whether a class arbitration may be maintained, the arbitrator shall determine whether the arbitration should proceed as a class arbitration. For that purpose, the arbitrator shall consider the criteria enumerated in this Rule 4 and any law or agreement of the parties the arbitrator determines applies to the arbitration. * * *

* * *

5. Class Determination Award

(a) The arbitrator's determination concerning whether an arbitration should proceed as a class arbitration shall be set forth in a reasoned, partial final award (the "Class Determination Award"), which shall address each of the matters set forth in Rule 4.

* * *

(d) The arbitrator shall stay all proceedings following the issuance of the Class Determination Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Class Determination Award. Once all parties inform the arbitrator in writing during the period of the stay that they do not intend to seek judicial review of the Class Determination Award, or once the requisite time period expires without any party having informed the arbitrator that it has done so, the arbitrator may proceed with the arbitration on the basis stated in the Class Determination Award. If any party informs the arbitrator within the period provided that it has sought judicial review, the arbitrator may stay further proceedings, or some part of them, until the arbitrator is informed of the ruling of the court.

(e) A Class Determination Award may be altered or amended by the arbitrator before a final award is rendered.

* * *

OPPOSITION
BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
NOV 15 2012
OFFICE OF THE CLERK

No. 12-135

IN THE

Supreme Court of the United States

OXFORD HEALTH PLANS LLC,

Petitioner,

v.

JOHN IVAN SUTTER, M.D.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the arbitrator exceed his powers under the Federal Arbitration Act when he interpreted the atypical terms of the agreement in this case to authorize the arbitration of class claims?

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STATEMENT OF THE CASE

This case presents a fact-bound dispute about whether a particular, unusually worded arbitration agreement should be interpreted to authorize class arbitration. After carefully considering the language of the agreement, the arbitrator concluded that "on its face, the arbitration clause in the Agreement expresses the parties' intent that class arbitration can be maintained." (App. 48a). The arbitrator dutifully reconsidered his interpretation of the agreement in light of this Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010), and came to the same conclusion. The courts below properly rejected Oxford's contention that the arbitrator's decision violated *Stolt-Nielsen*.

(1) The events giving rise to this litigation concern the method used by defendant Oxford Health Plans, a major provider of health insurance, in processing claims for reimbursement from some 16,500 physicians in New Jersey from 1996 to 2004. The plaintiff alleges that Oxford's practices deprived physicians of proper reimbursement by improperly delaying payment, by changing or "downcoding" claims to reflect procedures less expensive than those that had actually been performed, and by refusing compensation for procedures by improperly "bundling them" with other procedures. (App. 56a).

In 2002 respondent Sutter, a New Jersey physician who was injured by Oxford's reimbursement practices, filed a class action in the New Jersey state courts. Oxford moved to dismiss that action, relying on an arbitration provision contained in the pre-printed agreement that physicians were required to sign in order to obtain compensation for treating patients insured by Oxford. That agreement provided in pertinent part:

> No civil action concerning any dispute arising under this agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the Rules of the American Arbitration Association with one arbitrator.

(App. 46a-47a). Oxford moved for an order dismissing the action and compelling arbitration of the claims in the complaint. Oxford argued that under the arbitration provision "all actions concerning any disputes arising under the agreement should be sent to arbitration."[1] The New Jersey court granted the motion, dismissing the complaint and ordering that "the claims in Plaintiff's . . . Complaint are hereby referred to arbitration . . . ."[2]

In December 2002 Sutter and Oxford commenced arbitration. Sutter proposed that the arbitration proceed on behalf of the thousands of New Jersey physicians affected by Oxford's misconduct; Oxford opposed such a class proceeding. The arbitrator deferred resolving that dispute until this Court had decided *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003). Following the June 2003 decision in *Bazzle*, the parties submitted arguments on the question of whether the arbitration could be maintained as a class action.

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[1] Transcript of Motion, Oct. 25, 2002, Superior Court of N.J., Essex County, No. ESX-L-6644-02, at 6.

[2] Order Dismissing Case and Referring Claims to Arbitration, Nov. 21, 2002.

The arbitrator held that the arbitration agreement authorized class proceedings. The arbitrator recognized that he could not order class arbitration without "the parties' agreement." (App. 45a). He emphasized that the terms of the arbitration clause were "unique in my experience" and "much broader even than the usual broad arbitration clause." (App. 47a). The interpretation of the arbitration clause, the arbitrator reasoned, turned on the relationship between the first part of the clause (which prohibits certain civil actions in court) and the second part of the clause (which provides that certain claims shall be submitted to arbitration). The arbitrator concluded that the scope of the two parts of the clause was coextensive; the claims that under the second part are to be arbitrated are the same as the claims that, under the first part, may not be the subject of a civil action instituted in court.

> Having prohibited [in the first phrase] all conceivably possible civil actions, the clause takes this universal and unlimited class of prohibited civil actions and says, "and all such disputes shall be submitted to final and binding arbitration . . . ."
>
> This means that the clause sends to arbitration "all such disputes," which, apart from the prohibition, could have been brought in the form of any conceivable civil action. . . . [T]he disputes that the clause sends to arbitration are the same universal class of disputes the clause prohibits as civil actions

> before any court. It follows that the intent of the clause, read as a whole, is to vest in the arbitration process everything that is prohibited from the court process.

(App. 47a).

Because class actions were within the scope of the prohibition against civil actions, the arbitrator concluded that class actions must be among the matters that were to be resolved by arbitration.

> A class action is plainly one of the possible forms of civil action that could be brought in a court concerning a dispute arising under this Agreement. . . . [B]ecause all that is prohibited by the first part of the clause is vested in arbitration by its second part, I find that the arbitration clause must have been intended to authorize class actions in arbitration.

(App. 48a; see *id.* ("on its face, the arbitration clause in the Agreement expresses the parties' intent that class action arbitration can be maintained")).

In March 2005, following a period of discovery, the arbitrator determined that the arbitration should in fact proceed as a class action. The arbitrator issued a Partial Final Class Determination delineating the scope of the class of claimants. The arbitrator stayed his award to permit the parties to seek judicial review of his decision. (App. 79a-84a). Oxford then brought an action in federal district court seeking to overturn the arbitrator's decision.

The district court concluded that the arbitrator "did exactly what the Supreme Court said in *Green Tree* an arbitrator must do: interpret the agreement to determine whether the contract permits class certification. [The arbitrator] knew about and followed the law." (App. 71a). "[The arbitrator] proceeded to perform a detailed analysis and interpretation of the agreement, concluding that 'the arbitration clause in the Agreement expresses the parties' intent that class action arbitration can be maintained.'" (*Id.*) The district judge upheld the arbitrator's interpretation of the agreement. "Under the deferential standard of review that this Court must follow, [the arbitrator's] interpretation is reasoned and rational." (*Id.)* Oxford appealed to the Third Circuit the arbitrator's decision that a class proceeding was warranted under the circumstances of this case, but did not in that appeal challenge the arbitrator's conclusion that the agreement itself permitted class arbitration. (App. 55a-59a; see Pet. 6). In 2007 the Third Circuit upheld the challenged portion of the arbitrator's decision. (App. 55a-59a).

(2) Oxford subsequently asked the arbitrator to reconsider his 2003 decision in light of this Court's 2010 decision in *Stolt-Nielsen*. The arbitrator again concluded that "the text of the clause itself authorizes, indeed requires, class-action arbitration." (App. 39a).

> [T]he [arbitration] clause is not at all silent: It plainly says "No civil action . . . and all (emphasis supplied) such disputes" are to go to arbitration. It was my task to construe that clause. "All," I found, and would find again, means all, without exception, the entire universe of actions that could possibly have been brought in any court, necessarily including class actions.

(App. 41a). The arbitrator explained that his 2003 decision, unlike the arbitrators' decision in *Stolt-Nielsen*, was not based on public policy.

> [T]he [2003] determination in this arbitration involved no such adventures into public policy, but was rather concerned solely with the parties' intent as evidenced by the words of the arbitration clause itself. . . . I found that the arbitration clause unambiguously evinced an intention to allow class arbitration, indeed to require it.

(App. 35a-36a). The arbitrator also rejected Oxford's contention that his 2003 decision had inferred the existence of an agreement on class arbitration merely from the absence of express language excluding class proceedings.

> [T]he [2003 decision] was not based on such reasoning. The absence of such an exclusion was not something that had to be relied on to divine the meaning of the clause. It merely corroborated what was already obvious from the language of the clause itself. "All" means all. As noted in the [2003 decision], if it had been the parties' intention to exclude class actions from the clause, *in the face of such sweeping language*, normal drafting would have suggested a specific exclusion.

(App. 39a)(emphasis added)

Oxford returned to district court, asking that the court vacate the arbitrator's 2010 decision in light of

Stolt-Nielsen. The district court, however, concluded that the arbitrator had "performed the appropriate function of an arbitrator under the FAA after *Stolt-Nielsen*; [the arbitrator] examined the parties' intent, and gave effect to the arbitration agreement." (App. 28a-29a).

> [A]fter giving full consideration to *Stolt-Nielsen*, [the arbitrator] concluded that the contractual basis between these parties, i.e. their arbitration agreement, clearly and unambiguously expressed their intent to authorize class action arbitration despite omission of the words "class action."

(App. 28a). The district judge declined Oxford's request that he interpret the arbitration agreement de novo (App. 27a-28a), and denied the motion to vacate the arbitrator's decision. (App. 30a).

On appeal the Third Circuit rejected four arguments advanced by Oxford. First, the court of appeals held that an agreement may be interpreted to permit class arbitration even if "the words 'class arbitration' are not written into the text of the arbitration clause." (App. 13a n. 5). Second, the court of appeals rejected Oxford's contention that the arbitrator's interpretation of the agreement in the instant case was merely a "pretext" designed to hide the fact that the arbitrator was actually imposing on the parties "his policy preferences." (App. 14a-15a). Third, the appellate court held that *Stolt-Nielsen* did not preclude an arbitrator, in construing an agreement, from considering the agreement's "unique . . . breadth," noting that *Stolt-Nielsen* indicated that an arbitrator ordinarily could indeed consider "the particular wording" of an agreement. (App. 17a)(*quoting Stolt-Nielsen*, 130

S. Ct. at 1770). Finally, the Third Circuit concluded that "the arbitrator did not impermissibly infer the parties' intent to authorize class arbitration from their failure to preclude it." (App. 17a).

REASONS FOR DENYING THE PETITION

This appeal presents a dispute about the construction of a form arbitration agreement used by Oxford in 1998. The interpretation of that agreement rests on its distinctive two part structure, one part delineating the claims that may not be brought in court and the other part specifying the claims that are to be resolved in arbitration. The arbitrator concluded that the two parts are coextensive, and that the parties thus intended that the agreement send to arbitration all of the claims, including class actions, that the first part bars from court. Oxford's disagreement with that text-based interpretation does not warrant review by this Court.

Oxford contends that the arbitrator actually based his "purported" interpretation of the agreement and of the intent of the parties on policy considerations, and on the mere fact that the agreement did not explicitly bar class arbitration, grounds that would be inconsistent with this Court's decision in *Stolt-Nielsen.* The arbitrator, however, expressly insisted that these were not the bases of his interpretation, and the courts below rejected this fact-bound objection. That dispute also does not warrant review.

Petitioner suggests that there is a conflict between the Second and Fifth Circuits regarding the application of *Stolt-Nielsen.* The particular issue regarding which the Fifth Circuit recently stated that it disagreed with the Second Circuit, however, is not presented by this case. The Third Circuit below applied to the particular circumstances of this case settled legal standards that do not differ significantly from the standards applied by the Fifth Circuit.

I. THIS COURT SHOULD NOT GRANT REVIEW IN THE INSTANT CASE TO RESOLVE ANY CONFLICT BETWEEN THE SECOND AND FIFTH CIRCUITS

Petitioner's claim of a circuit conflict rests largely on two decisions, *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 1742 (2012), and *Reed v. Florida Metropolitan University, Inc.*, 681 F.3d 630 (5th Cir. 2012). In both *Jock* and *Reed* an arbitrator had approved a claimant's request for class arbitration. There were some similarities in the language of the arbitration provisions in *Jock* and *Reed*, but there were differences in the cases as well. In *Jock*, but not *Reed*, there was a dispute about whether the arbitrator had actually determined that the agreement at issue authorized class arbitration. 646 F.3d at 125 (majority opinion), 129 (Winter, J., dissenting). In *Reed*, but not *Jock*, the arbitrator had reasoned that the defendant was legally obligated to make clear in the agreement that the plaintiff was waiving her right to pursue a class action. 681 F.3d at 643-44. The arbitration agreement in *Jock* was construed in light of Ohio law, 646 F. 3d at 126; the agreement in *Reed* was interpreted in light of Texas statutes. 681 F.3d at 641 n. 10, 641-42, 643. The two circuits reached different conclusions regarding the particular provisions before them. The Second Circuit in *Jock* upheld the decision of the arbitrator in that case to direct class arbitration; the Fifth Circuit in *Reed* overturned the decision of the arbitrator in that case to authorize such class arbitration.

The Fifth Circuit in *Reed* expressly disagreed with what it perceived to be a specific legal error in the Second Circuit decision in *Jock*. Assuming arguendo that the Fifth Circuit correctly characterized the basis of the Second Circuit decision with which it disagreed, that conflict between the Fifth and Second Circuits concerns an issue that is not presented by, and that this Court cannot resolve in, the instant case.

(1) The Fifth Circuit decision in *Reed* does not contain a sweeping rejection of all parts of the Second Circuit decision in *Jock*, or insist that the arbitration agreement in *Jock* was incorrectly interpreted. Rather, in *Reed* the Fifth Circuit disagreed only with one specifically identified aspect of the Second Circuit's *Jock* decision. According to *Reed*, the Second Circuit in *Jock* held that where an arbitrator has ordered class arbitration, the courts cannot review the basis or legality of that decision, but may consider only claims that the arbitrator had no authority to decide the question at all. Under *Jock*, the Fifth Circuit asserted, courts must

> restrict[] [their] analysis to whether the parties had submitted the class arbitration issue to the arbitrator and "whether the agreement or the law categorically prohibited the arbitrator from reaching that issue." [646 F.3d at 123]. . . . The majority [in *Jock*] reasoned that, because the class arbitration issue was submitted to the arbitrator, and neither the law nor the

> agreement barred the arbitrator from deciding the issue, the arbitrator did not exceed her powers in resolving the issue.

681 F.3d at 644-45.[3] It was the Second Circuit's asserted complete refusal to examine the basis of an arbitrator's decision to authorize class proceedings that prompted the Fifth Circuit to

> respectfully disagree with the Second Circuit decision in *Jock*. We read *Stolt-Nielsen* as requiring courts to ensure that an arbitrator has a legal basis for his class arbitration determination . . . . Such an analysis necessarily requires some consideration of the arbitrator's award and rationale. . . . *To the extent that* the Second Circuit decided not to undertake an inquiry into the arbitrator's reasoning, we must part ways.

681 F.3d at 645-46 (emphasis added).[4]

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[3] Similarly, petitioner describes the decision in *Jock* as having been based on the premise "that judicial review [is] limited to verifying 'that the issue of whether the agreement permitted class arbitration was squarely presented to the arbitrator.'" Pet. 14, *quoting Jock*, 646 F.3d at 124.

[4] *Reed* contains a footnote commenting that "[w]e disagree with *Sutter* for essentially the reasons stated herein with respect to the Second Circuit's *Jock* decision." 681 F.3d at 644 n. 13. The adjective "essentially" calls the meaning of this passage into doubt, and "the reasons stated here with respect to . . . *Jock*" have no application to the issues in *Sutter*, as demonstrated below.

If, as the Fifth Circuit contended in *Reed*, the Second Circuit decision in *Jock* precludes judicial scrutiny of the basis of an arbitrator's decision to authorize class arbitration—so long as that issue was properly submitted to the arbitrator—there would indeed be a conflict between *Reed* and *Jock*.[5] Such a conflict might at some point warrant review by this Court. But that issue is not presented by this case.

In the instant case the Third Circuit clearly *did* "undertake an inquiry into the arbitrator's reasoning," just as the Fifth Circuit correctly held is required by *Stolt-Nielsen*. First, the Third Circuit assessed the arbitrator's textual basis for holding that the agreement authorized class arbitration, and concluded that it was sufficiently plausible to pass muster under the governing deferential standard of judicial review. (App. 14a, 16a, 17a). Second, the Third Circuit carefully considered Oxford's contention that "the arbitrator's purported examination of the parties' intent was pretext for the imposition of his policy preferences." (App. 14a). The court of appeals rejected that accusation of impropriety on the part of the arbitrator, concluding to the contrary that the arbitrator "performed his duty appropriately and endeavored to give effect to the parties' intent." (App. 15a). Third, the

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[5] It is far from clear that *Reed's* characterization of *Jock* is correct. The Second Circuit in that case also reviewed the basis of the arbitrator's decision, and concluded that "[i]t was not unreasonable, and clearly not manifestly wrong." 646 F.3d at 127. *Jock* was issued before *Reed* was decided, and the Second Circuit has not yet had an opportunity to clarify whether *Jock* means, as the Fifth Circuit concluded, that a court reviewing an arbitrator's decision that an agreement permits class actions can look only to whether that issue was properly before the arbitrator.

Third Circuit considered and rejected Oxford's contention that the arbitrator had inferred the parties' agreement to class arbitration merely from their failure to preclude that procedure, a type of inference that the court below agreed was proscribed by *Stolt-Nielsen*. (App. 17).[6] Consistent with the Fifth Circuit's insistence that a court must assure that an arbitrator's decision is grounded on "a legal basis," 681 F.3d at 645, the Third Circuit concluded that in this case the arbitrator had indeed acted "within the bounds of the law." (App. 17a).

In fact, Oxford does not appear to seriously contend that the Third Circuit refused to review at all the basis of the arbitrator's decision or to consider Oxford's arguments that the arbitrator had acted on an impermissible basis. To the contrary, Oxford notes that the Third Circuit "summarized the arbitrator's textual analysis" and "accepted that reasoning as sufficient to establish contractual 'intent.'" (Pet. 11-12). Petitioner also acknowledges that the court of appeals actually considered and "rejected Oxford's argument that the parties had never reached any actual agreement" and "that the arbitrator impermissibly inferred the parties' intent." (Pet. 12).

This case thus does not provide an appropriate vehicle for resolving a dispute as to whether, as the Fifth Circuit held in *Reed*, a court in reviewing a class arbitration decision must determine whether the grounds relied on by the arbitrator were permissible under *Stolt-Nielsen*.

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[6] "[T]he arbitrator did not impermissibly infer the parties' intent to authorize class arbitration from their failure to preclude it." (App. 17a).

Whichever way this Court were to decide that issue, the result in the instant case would be the same. Under either that holding in *Reed* or the assertedly contrary rule in *Jock*, the decision of the Third Circuit would be affirmed.

Petitioner points out that the agreements in both *Reed* and *Jock* contained language providing that the arbitrator could award the same remedies that would be available in court. (Pet. 14, 16, 18). As petitioner observes, the Fifth Circuit in *Reed* concluded that such language did not indicate an agreement to authorize class proceedings. (Pet. 18; see 681 F.3d at 643). In *Jock*, on the other hand, the Second Circuit stated that an arbitrator could reasonably conclude that this type of provision meant that the parties intended to approve such class proceedings. 646 F.3d at 126-27. That difference between the Second and Fifth Circuits also cannot be resolved in the instant case, however, because the Oxford arbitration agreement does not contain, and thus the arbitrator did not rely on, any such "equal remedy" language.

(2) Oxford argues on a number of other grounds that the decision of the Third Circuit conflicts with the Fifth Circuit's decision in *Reed*. But these asserted differences between the Third and Fifth Circuits are entirely distinct from the basis on which the Fifth Circuit in *Reed* disagreed with the Second Circuit in *Jock*: the supposed refusal of the Second Circuit in *Jock* even to review the basis of the arbitrator's decision. These claimed differences between the Third and Fifth Circuits fall far short of the type of genuine circuit conflict that warrant review by this Court.

Oxford suggests that the Third Circuit has held that under the Federal Arbitration Act there are no legal constraints on the grounds on which an arbitrator can order class arbitration. The Third Circuit decision, petitioner insists, holds that arbitrators have "effectively unfettered discretion" to order class arbitration. (Pet 13; see *id.* at 15 ("essentially uncontrolled discretion")). A holding that arbitrators are at liberty to order class arbitration on whatever basis they please would undoubtedly conflict with the Fifth Circuit's decision in *Reed*, as well as with this Court's decision in *Stolt-Nielsen*. But as the qualifying adverbs "effectively" and "essentially" suggest, the Third Circuit opinion in this case contains no such legal rule.

The Third and Fifth Circuits recognize similar legal limitations on the authority of an arbitrator to order class arbitration. The Fifth Circuit holds that an arbitrator can only direct class arbitration where there is "a contractual basis for doing so." *Reed*, 681 F.3d at 640, 644. As the decision below makes clear, the Third Circuit applies the same requirement: "an arbitrator lacks the power to order class arbitration unless there is a contractual basis for concluding that the parties agreed to that procedure." (App. 8a; see *id.* at 12a, 14a). In the Fifth Circuit an arbitrator may not simply disregard the terms of an agreement and "dispense his own brand of industrial justice." *Reed*, 681 F.3d at 637 (*quoting United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)), 638 (*quoting Stolt-Nielsen*). The Third Circuit applies the same limitation. (App. 81)(*quoting Steelworkers* and *Stolt-Nielsen*). The Fifth and Third Circuits agree that an arbitrator cannot base a decision to order class arbitration on policy considerations. *Compare Reed*, 681 F.3d at 641, *with* App. 14a-15a, 16a. Both circuits hold as well that the existence of an agreement to authorize class arbitration cannot be inferred merely from the fact that the arbitration agreement does not expressly preclude class proceedings. *Compare Reed*, 681 F.3d at 645, *with* App. 71a. And in both circuits the existence of such an agreement to class arbitration cannot be inferred simply from the fact that the parties agreed to arbitration at all. *Compare Reed*, 681 F.3d at 639, *with* App. 8a, 11a.

(3) Oxford contends that the Third and Fifth Circuits disagree about whether an arbitrator's decision to order class proceedings should be subject to "meaningful review" by the courts. (Pet. 13, 16, 20, 26). The phrase "meaningful review," however, does not appear in either *Reed* or the decision below. Oxford's objection that the judicial review accorded by the court below was not sufficiently "meaningful" reflects only a disagreement with the outcome of the appeal in this case, not the existence of any circuit conflict regarding the controlling legal standards.

The Third Circuit's review of the arbitrator's decision in this case involved a careful evaluation whether that decision was consistent with the substantive standards described above, standards that are the same as those applied in the Fifth Circuit. Moreover, the Third and Fifth Circuits utilize very similar standards of judicial review when resolving a challenge to an arbitral decision. In the instant case the Third Circuit applied a "deferential standard of review" (App 5a); the Fifth Circuit in *Reed* applied an "exceptionally deferential standard of review." 681 F.3d at 637. The Third Circuit does not "entertain claims that an arbitrator has made factual or legal errors." (App. 5a). Similarly, the Fifth Circuit "will . . . not set aside an [arbitration] award for 'a mere mistake of fact or law.'" *Reed*, 681 F.3d at 638 (*quoting Rain CII Carbon, LLC v. ConocoPhillips Co.*, 674 F.3d 469, 471 (5th Cir. 2012));

see *Stolt-Nielsen*, 130 S. Ct. at 1767 ("It is not enough for petitioners to show that the [arbitration] panel committed an error—or even a serious error").

> [A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

Reed, 681 F.3d at 637 (*quoting United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987)).

The Third Circuit will uphold an arbitrator's interpretation of an arbitration agreement if it can "be rationally derived from the parties' agreement." (App. 7a; see *id.* at 17a). The Fifth Circuit applies the same rule, requiring only that an award have "a basis that is at least rationally inferable . . . from the letter or purpose of the agreement." *Reed*, 681 F.3d at 637 n. 8 (*quoting Anderman/Smith Operating Co. v. Tenn. Gas Pipeline Co.*, 918 F.2d 1215, 1218 (5th Cir. 1990)). Despite these uniformly recognized limitations on the extent to which a court may substitute its judgment for the decision of the arbitrator selected by the parties, the Third Circuit will overturn such a decision where there is "clear evidence of arbitral overreaching" (App. 15a), where there is "reason to doubt the authority or integrity of the arbitral forum" (App. 6a), and where an arbitral decision is not "within the bounds of law" governing when an arbitrator can conclude that the parties agreed to class arbitration. (App. 17a).

Oxford repeatedly insists that the Third Circuit has held that an arbitrator's decision ordering class proceedings will automatically be upheld whenever that decision merely "purports" to find that the parties agreed to class arbitration. (Pet. 3, 12, 13, 14, 20, 22, 26). The meaning of this assertion is not entirely clear. Petitioner may be contending that so long as an arbitrator's decision recites a finding that the parties agreed to class arbitration, the Third Circuit bars a court from even considering a contention that the arbitrator's decision was grounded on an impermissible basis or type of inference. Any such contention, however, is decisively refuted by what actually occurred in this case, in which the court of appeals indeed assessed and resolved just such contentions even though the arbitrator had held that the terms of the arbitration agreement encompassed an agreement to allow class arbitration.

Oxford's concern about arbitral decisions that "purport" to determine the intent of the parties may be a reference to cases in which a party asserts that an ostensible arbitral finding that there was an agreement between the parties was actually a ruse, intended to cover up an improper standard or motive on the part of the arbitrator. Oxford has at times suggested that the arbitrator in this case was indeed dissembling. It describes the arbitrator as having "purported to discern . . . an intent [to authorize class arbitration] in the language of the agreement." (Pet. 11). Oxford asserts that "[t]he arbitrator's . . . ruling is best explained as a *post hoc* rationalization for a result clearly based in fact on the policy preference revealed by the arbitrator's original decision." (Pet. 24). And in the court below Oxford expressly contended that "the arbitrator's reference to ascertaining the parties' intent was pretense."[7] The Third Circuit did not, however, refuse to consider these arguments. To the contrary, the court of appeals discussed in detail and directly addressed Oxford's contention "that the arbitrator's purported examination of the parties' intent was *pretext* for the imposition of his policy preferences." (App. 14a)(emphasis added). The court of appeals rejected Oxford's argument on the merits: "Oxford's allegations of pretext are simply dressed-up arguments that the arbitrator interpreted its agreement erroneously." (App. 15a).

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[7] Brief of Defendant-Appellant Oxford Health Plans LLC, p. 37 (capitalization omitted).

(4) Oxford contends that the Fifth and Third Circuits disagree about whether class proceedings are authorized by what petitioner labels a "standard" arbitration clause. The Fifth Circuit in *Reed* characterized the language of the particular agreement in that case as involving "standard" wording that is found "in many arbitration agreements." 681 F. 3d at 642; see Pet. 4 (characterizing the agreement in *Reed* as a "standard provision"), 18 (same). Petitioner insists that the wording of the agreement in this case also used the "standard language" (Pet. 3) and was a "routine" arbitration clause. (Pet. 15). Petitioner contends that because the wording of the arbitration clause in this case was simply the same type of "routine," "standard" provision at issue in *Reed*, the differing outcomes in the Third and Fifth Circuits must present a circuit conflict. (Pet. 13, 16).

But the arbitrator's decision in this case rested on his conclusion that the wording of the arbitration agreement in question here was in fact quite unlike more common arbitration clauses.

> This clause is much broader even than the usual broad arbitration clause. The introductory

> phrase, "No civil action concerning any dispute arising under this agreement shall be instituted before any court," is unique in my experience and seems to be drafted to be as broad as can be. . . . It would not be possible to draft a broader or more encompassing clause.

(App. 47a). The arbitrator's holding that the agreement authorized class proceedings rested on his view that the wording of the agreement in question was quite different from "the usual" arbitration clause.[8] The arbitrator's construction of the agreement in this case turned on his interpretation of the inter-relationship between the first and second parts of the arbitration clause. (See pp. 3-4, supra). Oxford does not identify any other instance in which parties have used, or arbitrators have construed, this particularly idiosyncratic language.

In upholding the arbitrator's decision, the Third Circuit likewise emphasized that the arbitrator had concluded "that the parties' arbitration clause was unique in its breadth" (App. 16a; see *id.* at 3a), and rejected Oxford's attack on the arbitrator's construction of that unusual language. The Third Circuit only upheld the arbitrator's interpretation of the specific wording of the particular agreement in this case; it manifestly did not, as Oxford contends, hold that an intent to authorize class proceedings could be read into "any broad arbitration agreement." (Pet. 20). The Third Circuit's assessment of the arbitrator's interpretation of the particular provision in the instant case cannot be characterized as in conflict with the Fifth Circuit's assessment of the very different language at issue in *Reed* merely by using a single adjective—"broad"—to characterize the two dissimilar arbitration provisions.

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[8] Defendants in other cases have relied on just that distinction. In *Reed Elsevier Inc. v. Crockett*, 2012 WL 604305 (S.D. Ohio Feb. 24, 2012), the agreement provided that "any controversy, claim or counterclaim arising out of or in connection with [a settlement] . . . will be resolved by [binding arbitration]." The company, in opposing class arbitration, insisted that the Third Circuit's decision in the instant case was distinguishable because "the arbitration clause was different and much broader in scope than the clause in the [applicable] agreements." Brief of Appellee Reed Elsevier Inc., No. 12-3574 (6th Cir.), at 26, available at 2012 WL 3638416.

The wording and circumstances of arbitration agreements are simply too varied to permit the fashioning of some simple judicial standard dictating whether an agreement to authorize class proceedings can be inferred even from agreements with less idiosyncratic language. Even the wording of more common arbitration provisions differs in a number of respects, rendering impracticable the task of devising a uniformly applicable rule of textual interpretation. Several of the decisions referred to by petitioner as involving "broad" language involved wording that raised issues of textual interpretation quite different from both the agreement in *Reed* and the agreement in this case. For example, in *Smith & Wollensky Restaurant Group, Inc. v. Passow*, 831 F. Supp. 2d 390 (D.Mass. 2011), the agreement provided for arbitration of "any claim that, in the absence of this Agreement, would be resolved in a court of law," and defined "claim" as "any claims for wages, compensation and benefits." 831 F. Supp. 2d at 392. The arbitrator concluded that this particular wording encompassed class claims, and the district court held that "the language . . . supports such a ruling." *Id.* In *Amerix*

Corp. v. Jones, 2012 WL 141150 (D.Md. Jan. 17, 2012), the arbitrator's decision relied in part on the fact that the agreement did contain one express reference to class actions (prohibiting them in court), but had no similar express bar to class proceedings in arbitration. 2012 WL 141150 at *7. Some agreements (unlike the agreement in this case) provide that the arbitrator may award the same remedies that would be available in a judicial proceeding. (See p. 14, supra). A number of other types of substantive provisions have been important to the interpretation of particular arbitration agreements.[9]

Even where the text of agreements is the same, non-textual factors may warrant divergent interpretations of that language. "[T]he interpretation of an arbitration agreement is generally a matter of state law." *Stolt-Nielsen*, 130 S. Ct. at 1773; see *id.* at 1768 (relying on New York and maritime law).[10] Oxford contends that in this case the agreement should be interpreted in light of New Jersey law (Pet. 24 n. 10), a position it advanced in the courts below. (App. 72a). The same agreement might be subject to a different interpretation if it were governed by the law of another state. Several decisions cited by petitioner relied in part on state law principles that contracts of adhesion are to be interpreted against the drafter[11] and that contractual waivers of rights must be spelled out unambiguously.[12] State statutes regarding joinder of arbitration claims may be relevant, where they exist.[13] Moreover, Oxford argued in the courts below that the agreement in this case should also be construed in light of the positions taken by the parties in briefs filed in an earlier court proceeding, a factor that would not be present in all cases. (App. 15a). Oxford also suggests that the interpretation of this agreement should turn at least in part on how widespread class arbitrations were when the agreement was signed in 1998, a consideration whose impact would depend on the year in which an agreement was made. (Pet. 22). *Stolt-Nielsen* holds that "evidence of 'custom and usage,'" which could vary by industry, "is relevant to determining the parties' intent when an express agreement is ambiguous." 130 S. Ct. at 1769 n. 6. The interpretation of particular language in some cases might be influenced by how similar provisions had been construed at the time the language in question was adopted. In short, no decision by this Court could establish—even for so-called "standard" agreements, however defined—a single rule of construction that would encompass all these and other possible textual and non-textual factors.

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[9] See Answer Brief of Appellee American Arbitration Association, Inc., *Long John Silver's, Inc. v. Stewart*, No. 10-6249 (10th Cir.), at 10-11, 29-31 (arbitration agreement incorporated by reference the American Arbitration Association rules, which in turn provide for class arbitration); *Fantastic Sams Franchise Corporation v. FSRO Ass'n, Ltd.*, 683 F.3d 18, 23 (1st Cir. 2012)(possible significance of change in language of arbitration agreement).

[10] The Fifth Circuit in *Reed* relied on state law in construing the agreement in that case. 681 F.3d at 641 n. 10, 642, 643-44.

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[11] *Southern Communications Services, Inc. v. Thomas*, 829 F. Supp. 2d 1324, 1328 (N.D.Ga. 2011).

[12] *Louisiana Health Service Indemnity Co. v. Gambro A B*, 756 F. Supp. 2d 760, 768 (W.D.La. 2010).

[13] See *Lyndoe v. D.R. Horton, Inc.*, 2012 WL 3101704 at *3-*5 (10th Cir., July 24, 2012).

II. CERTIORARI SHOULD NOT BE GRANTED TO REVIEW THE ARBITRATOR'S FACT-BOUND INTERPRETATION OF THE PARTICULAR ARBITRATION PROVISION IN THIS CASE

Oxford emphatically disagrees with the arbitrator's interpretation of the arbitration agreement in this case. But petitioner's objections raise only fact-bound disputes regarding this particular agreement.

As explained above, the arbitrator grounded his interpretation on the inter-relationship between the two parts of the arbitration provision.

> No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the Rules of the American Arbitration Association with one arbitrator.

(App. 93a). The arbitrator concluded that the second part referred to arbitration all matters that the first part excluded from court. (App. 48a, 57a).

Oxford in this Court contends that the phrase "all such disputes" in the second part of the arbitration clause includes only disputes "under this Agreement" arising between Oxford and Sutter individually, and does not include all claims (including class claims) that are encompassed within the "civil action[s]" barred by the first part of the agreement. The arbitrator's interpretation of the inter-relationship between the two parts of the arbitration clause is the more plausible. But even if the arbitrator's reading of the arbitration clause was incorrect, a court may not overturn the arbitrator's interpretation of the agreement merely because it was "an error—or even a serious error." *Stolt-Nielsen*, 130 S. Ct. at 1767.

When this litigation first began in New Jersey courts, Oxford did not draw the distinction it now asserts between disputes and civil actions. To the contrary, Oxford's counsel argued that "Sutter's contract here says that all *actions* concerning any disputes arising under the agreement should be sent to arbitration."[14] In the Third Circuit, moreover, Oxford did not advance this textual argument until its petition for rehearing.[15] This Court does not ordinarily consider arguments that were not timely presented in the courts below, and should not do so in this case.

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[14] Transcript of Motion, *Sutter v. Oxford Health Plans Inc.*, N.J.Superior Ct., No. ESX-L-6644-02, Oct. 25, 2002, p. 6 (emphasis added); see *id.* at 30 ("plaintiff quoted the contract here as saying that any dispute arising under the contract needs to be arbitrated. That's wrong. The contract says, actions concerning any disputes arising under"). In its state court briefs Oxford also described the agreement as referring all "actions" (not all disputes under the agreement) to arbitration. Oxford's Memorandum of Law in Support of Its Motion to Stay and/or Dismiss in Part the Amended Complaint, 7 ("Sutter's . . . Agreement with Oxford requires arbitration of all 'civil action[s] concerning any dispute under' the . . . Agreement."), 12 ("Sutter's agreement to arbitrate any 'civil action concerning any dispute' arising under the . . . Agreement is even broader than the 'any dispute' language in *Martindale [v. Sandvik, Inc.*, 173 N.J. 76, 800 A. 2d 872 (2002)]"); Oxford's Reply Memorandum of Law in Further Support of its Motion to Stay and/ or Dismiss in Part the Amended Complaint, 2 ("Sutter does not dispute that his contract requires arbitration of all 'civil action[s] concerning any dispute arising under' his . . . Agreement.").

[15] Petition of Defendant-Appellant Oxford Health Plans LLC for Rehearing or Rehearing *En Banc*, 9-10.

Petitioner notes that under *Stolt-Nielsen* an arbitrator may not order class proceedings based merely on the arbitrator's own view of public policy, and maintains that the arbitrator did just that. (Pet. 24). The arbitrator, however, was well aware of that holding in *Stolt-Nielsen*. (App. 35a). In his 2010 opinion the arbitrator explained that his earlier 2003 opinion had no such basis. (*Id.*). Oxford appears to contend, as it did in the court below, that the arbitrator's 2010 opinion was a ruse intended to cover up the arbitrator's secret policy-based motives. (Pet. 24). The Third Circuit considered and rejected this attack on the good faith of the arbitrator. (App. 14a-15a). That dispute about the motives of the arbitrator in this particular case presents no question of law warranting review by this Court.

Finally, Oxford suggests that the arbitrator's original 2003 decision held (or, at least, might be interpreted to have held) that an agreement to class arbitration could be inferred merely from the fact that such class proceedings were not expressly prohibited. (Pet. 15). In his 2010 decision, however, the arbitrator made clear that his 2003 interpretation of the arbitration agreement was not based on that impermissible type of reasoning.

> Oxford argues that the [2003 decision] relied on absence of specific exclusion of class-action arbitration from this [arbitration] clause to indicate that it was the intention of the parties to include class arbitration [.] If true, this reasoning would run afoul of *Stolt-Nielsen*.

> However, the [2003 decision] was not based on such reasoning. The absence of such exclusion was not something that had to be relied on to divine the meaning of the clause. It merely corroborated what was already obvious. . . .

(App. 39a). Petitioner acknowledges that the language to which it objected in the 2003 opinion was not used in the 2010 opinion. (Pet. 5 n. 4 ("[t]he arbitrator [in 2010] retreated from his previous [2003] reliance on the lack of any specific exclusion of class arbitration")). The Third Circuit concluded that *neither* of the arbitrator's decisions had, in violation of *Stolt-Nielsen*, "impermissibly infer[red] the parties' intent to authorize class arbitration from their failure to preclude it." (App 17a). Oxford may contend that the Third Circuit misinterpreted, or the arbitrator misrepresented, the bases of the 2010 and 2003 arbitral decisions, but those fact-bound disputes do not warrant review by this Court.

III. THE QUESTION PRESENTED IS OF LIMITED AND DECLINING IMPORTANCE

Oxford asks this Court to begin the complex task of developing detailed legal standards governing how arbitrators are to construe, and how courts are to review arbitral decisions regarding, arbitration agreements that do not contain express language concerning whether or not class arbitrations are permitted. But at least since this Court's 2003 decision in *Bazzle*, companies (and corporate attorneys) framing arbitration agreements have been well aware that an agreement that lacked explicit language to the contrary might be construed to authorize class proceedings. The problem of interpreting arbitration agreements that do not deal expressly with the issue of class arbitration will fade away as parties preempt such disputes by using more specific language.

In an amicus brief filed in this Court even before the decision in *Stolt-Neilsen* called attention to the desirability of express language, the Chamber of Commerce of the United States advised the Court that already "[a] class action waiver is a key component of many Chamber members' arbitration agreements."[16] In *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), for example, the agreement provided that a plaintiff could obtain arbitration only in an "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." 131 S. Ct. at 1744. In *Concepcion* the American Bankers Association informed the Court that "[m]any of [its] members, constituent organizations and affiliates . . . have independently adopted as standard features of their consumer contracts provisions that call for individual arbitration . . . and disallow class proceedings."[17] Another amicus brief in *Concepcion* advised the Court that the issue in *Concepcion* would affect "tens of millions of arbitration agreements."[18] In *American Express Co. v.*

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[16] Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner, *AT&T Mobility v. Concepcion*. 1, available at 2010 WL 673841.

[17] Brief of Amici Curiae American Bankers Association, et al, 3, available at 2010 WL 3183853; see Brief of CTIA-The Wireless Association ® as Amicus Curiae in Support of Petitioner, 4 ("hundreds of wireless carriers" have arbitration agreements that ban class arbitration), available at 2010 WL 3183858.

[18] Brief of DRI—The Voice of the Defense Bar in Support of Petitioner, 1, available at 2010 WL 3183854.

Italian Colors Restaurant, No. 12-133, *certiorari granted* November 13, 2012, the Chamber of Commerce informed the Court that today "[m]ost arbitration agreements require that disputes be resolved on an individual, rather than classwide basis."[19] It is clear that express provisions regarding the permissibility of class arbitration are now widely utilized.[20]

In the instant case the Chamber of Commerce argues that "[w]hether a company is subject to the significant burdens attending class arbitration under an agreement governed by the FAA should not depend on whether suit is brought in New York, New Jersey, or Texas."[21] But as the Chamber pointed out only two years ago in its briefs in *Concepcion*, and only three months ago in its brief in *Italian Colors*, its members and countless other businesses are already assuring that the interpretation of arbitration agreements does not vary by circuit or by state simply by including express language in their arbitration provisions, rather than continuing to use non-explicit arbitration clauses. Petitioner warns that parties will not view arbitration "as a desirable alternative to litigation" if they cannot be confident that arbitrators will not misconstrue non-explicit "broad" arbitration provisions to permit class arbitration (Pet. 27); but parties can avoid that problem simply by using explicit language more to their liking.

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[19] Brief of the Chamber of Commerce of the United States of America, et al., as *Amici Curiae* in Support of Petitioners, p. 2. The arbitration agreement in that case provides in part: "There shall be no right or authority for any Claims to be arbitrated on a class action basis . . . ." *In re American Exp. Merchants' Litigation*, 667 F.3d 204, 209 (2d Cir. 2012).

[20] This is not, of course, a recent development. Some firms recognized decades ago the desirability of addressing this issue with express language. See *Fantastic Sams Franchise Corp. v. FSRO Ass'n., Ltd.*, 683 F.3d 18, 20 (1st Cir. 2012)(arbitration agreement reworded in 1988 to expressly bar class arbitration).

[21] Brief of the Chamber of Commerce of the United States of America as Amicus *Curiae* Supporting Petitioner, at 4.

Petitioner and amici argue that class arbitration would be both harmful and unfair to the defendants. But companies which share that concern ordinarily have the ability to avoid such proceedings. Businesses such as Oxford, like virtually all retailers and employers, have as a practical matter total control over the wording of the arbitration agreements that they use. No ordinary customer or employee is in a position to object to or negotiate the terms of pre-printed form arbitration agreements to which they must agree as a condition of purchasing goods or services or obtaining or continuing employment. Oxford itself rewrote its own arbitration agreement in 2003, more than nine years ago, to expressly bar class arbitration with regard to claims arising after that date.[22] Over time there will be a further decline in the number of arbitration disputes that involve older, less precisely phrased arbitration agreements, as parties increasingly use agreements with explicit language regarding class arbitration.

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[22] Partial Final Class Determination Award of Arbitrator, 10 ("since May 2003, Oxford has added a provision to the standard arbitration clause specifically excluding the signing physician from class arbitration. . . . I am excluding from the class for this arbitration all those persons whose contracts contain a prohibition on class arbitrations"). This portion of the arbitrator's decision is not included in the Petition Appendix; it falls in the ellipsis at p. 81a. The arbitration agreement in this case dates from 1998.

CONCLUSION

The petition for a writ of certiorari should be denied.

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November, 2012

REPLY
BRIEF

No. 12-135

IN THE

Supreme Court of the United States

OXFORD HEALTH PLANS LLC,

Petitioner,

v.

JOHN IVAN SUTTER, M.D.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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I. THE CIRCUITS ARE SQUARELY DIVIDED AS TO WHETHER AN ARBITRATOR MAY PERMISSIBLY CONSTRUE A BROAD ARBITRATION CLAUSE, WITHOUT MORE, AS AN AGREEMENT TO AUTHORIZE CLASS ARBITRATION

As the petition demonstrates (Pet. 13-20), the Second, Third, and Fifth Circuits have all considered whether an arbitrator has the power to impose class arbitration on a theory that parties implicitly "agreed" to class proceedings, where there is no evidence of any such agreement other than the parties' adoption of a broad arbitration clause that prohibits court actions and directs all disputes to arbitration. *See* Pet. App. 1a-18a; *Jock* v. *Sterling Jewelers Inc.*, 646 F.3d 113 (2d Cir. 2011); *Reed* v. *Florida Metro. Univ., Inc.*, 681 F.3d 630 (5th Cir. 2012). The Third Circuit in this case and the Second Circuit in *Jock* have said yes. The Fifth Circuit in *Reed* has said no. The question is ripe for review.

1. Sutter asserts that the Third Circuit's decision here does not conflict with *Reed* because the contractual language at issue is "very different," with the language here being "particularly idiosyncratic." Opp. 20; *see* Opp. 19-23. That is demonstrably incorrect.

The language here provides that "No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration[.]" Pet. App. 93a. The language in *Reed* had precisely the same "two part structure" (Opp. 8): One part provided that "Neither [party] shall file or maintain any lawsuit in any court against the other," while another specified that "any dispute ... no matter how described, pleaded or styled, shall be resolved by binding arbitration." Pet. 17 n.8 (quoting clause). Likewise, the parties in *Jock* agreed to arbitrate "any dispute, claim, or controversy ... which could have otherwise been brought before an appropriate government or administrative agency or in a[n] appropriate court," with the employee expressly "waiving [her] right to commence any court action." 646 F.3d at 116-117 (quoting contract); *see* Pet. 13 n.7. No amount of squinting can identify any difference in these formulations that is material to the question presented here.

The appearance of indistinguishable language in three otherwise unconnected appellate decisions from the last three years also demonstrates the lack of any basis for the arbitrator's central assertion that the language here is "unique" (Pet. App. 47a), or for any decision or argument based on that assertion (*see, e.g.*, Opp. 19-21). As Sutter acknowledges (Opp. 19), the Fifth Circuit in *Reed* recognized the language before it as "standard" wording found "in many arbitration agreements." 681 F.3d at 642. Neither Sutter nor any of the opinions below actually identifies any material difference between that language and the language at issue here. And the ability of an arbitrator simply to *assert* that a clause is "unique" (Pet. App. 47a), and to purport to conclude on that basis that the parties must have "intended" to authorize class arbitration (*id.* at 48a), exposes the core of the problem here. *See* Opp. 19-20. Allowing courts to defer to such a "remark[]" (Pet. App. 16a; *compare* Opp. 20-21), without subjecting it to any meaningful degree of independent review, leaves defendants without any effective means of enforcing *Stolt-Nielsen*'s clear requirement of true contractual consent. *See also Jock*, 646 F.3d at 128 (Winter, J., dissenting) (Second Circuit's adoption of same approach has "rendered [*Stolt-Nielsen*] an insignificant precedent in this circuit"); Pet. 25-26.

Nor, clearly, is it tenable to suggest (Opp. 21-23) that arbitration provisions are so variable that this Court should simply despair of providing any further guidance on the critical question left open in *Stolt-Nielsen*. Opp. 21-23. Broad "any dispute" arbitration provisions may be phrased in different ways, but they have a common gist: All disputes go to arbitration, not to court. *See Reed*, 681 F.3d at 642 (collecting sources).[1] An arbitration clause saying essentially just that, without more, either may or may not support a fair inference that the parties, by adopting it, "*agreed to authorize* class arbitration." *Stolt-Nielsen*, 130 S. Ct. at 1776.[2]

In this case and in *Jock*, the Third and Second Circuits held that such broad arbitration clauses provided, by themselves, a sufficient "contractual basis" to permit an arbitrator to order class arbitration under *Stolt-Nielsen*, 130 S. Ct. at 1775. In *Reed*, the Fifth Circuit held that a functionally indistinguishable clause did not. That is a square conflict warranting this Court's review.

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[1] One reason for parties to use language making both points is to avoid any question that the parties are forgoing recourse to the courts. *See, e.g.*, *Garfinkel* v. *Morristown Obstetrics & Gynecology Assocs., P.A.*, 773 A.2d 665, 672 (N.J. 2001) ("The better course would be the use of language reflecting that the employee, in fact, knows that other options such as ... judicial remedies exist; [and] that the employee also knows by signing the contract, those remedies are forever precluded[.]" (quoting *Alamo Rent A Car, Inc.* v. *Galarza*, 703 A.2d 961, 966 (N.J. Super. Ct., App. Div. 1997))).

[2] Sutter points out (Opp. 22-23) that there are circumstances in which other factors may affect the proper interpretation of an arbitration clause. He does not, however, suggest that any such factor figured in any of the decisions below in this case. Indeed, the *absence* of any potentially confounding factor makes this case an excellent vehicle for review. *See* pp. 7-8, *infra*.

2. In an attempt to deny or minimize the conflict, Sutter suggests that there is no conflict because the Third Circuit theoretically left the door ajar for review of some future arbitral opinion the court might be willing to characterize as "totally irrational" (Pet. App. 17a). *See* Opp. 17; *see generally* Opp. 10-19.[3] Indeed, he argues that here the court undertook a "careful evaluation" of the arbitrator's decision, applying the same "substantive standards" as the Fifth Circuit. Opp. 16. None of this is remotely persuasive, in light of the diametrically opposite results reached in this case and in *Reed*.

Of course, all courts endeavor to apply the same standards, if that means only identifying and stating basic principles at a high level of generality. *See, e.g.*, Opp. 15-17. The conflict here has emerged because the lower courts have understood these standards differently, and applied them in different ways to indistinguishable facts.

In this case, for example, the Third Circuit drew from *Stolt-Nielsen* a "lesson ... that where, as here, the parties' intent with respect to class arbitration is in question, the breadth of their arbitration agreement is relevant to the resolution of that question." Pet. App. 17a. In contrast, *Reed* concludes that a broad "'any dispute' clause is a standard provision that may be found, in one form or another, in many arbitration agreements," "merely reflects an agreement between the parties to arbitrate their dispute," and "is therefore not a valid contractual basis upon which to conclude that the parties agreed to submit to class arbitration." 681 F.3d at 642-643; *see* Pet. 18-19.

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[3] Sutter recites a few differences of detail among the cases. Opp. 9-10. He does not try to explain why the Court should view those differences as consequential, which they are not.

More broadly, *Reed* acknowledges the normally narrow scope of judicial review of arbitral decisions, but on this critical threshold issue it "read[s] *Stolt-Nielsen* as requiring courts to ensure that an arbitrator has a legal basis for his class arbitration determination." 681 F.3d at 645. That is, before an objecting party may be compelled to submit to class arbitration, a reviewing court must satisfy itself that the arbitrator indeed had a sufficient "contractual basis for concluding that the party *agreed* to do so." *Stolt-Nielsen*, 130 S. Ct. at 1775. The Fifth Circuit concluded that a broad arbitration clause, by itself, is not such a basis as a matter of law. In this case, in contrast, the Third Circuit dismissed the same objections to an arbitrator's assertion of a "contractual basis" for class arbitration, under a materially indistinguishable contractual provision, as "uncognizable claims of factual and legal error." Pet. App. 16a; *see id.* at 14a-17a. The limitation on judicial review imposed by the Second Circuit in *Jock* is, if anything, even narrower, as Sutter himself points out. *See* Opp. 10-12; *Jock*, 646 F.3d at 123; Pet. 14-15.

As a practical matter, then, the Second and Third Circuits have made quite clear that they will not—and their district courts may not—conduct any meaningful review of an arbitrator's assertion that he or she has divined bilateral "agreement" to class arbitration from nothing more than the common language of a broad arbitration clause. It is thus unsurprising that the Fifth Circuit expressly saw its adoption of a more searching approach as a "disagree[ment]" both with *Jock* and with the Third Circuit's decision in this case. 681 F.3d at 645-646; *id.* at 644 n.13 ("We disagree with *Sutter* for essentially the reasons stated herein with respect to the Second Circuit's *Jock* decision.").[4] That recognition of a conflict is correct, and Sutter cannot ignore it or wish it away. *See, e.g.*, Opp. 11 n.4.

II. THIS CASE IS AN IDEAL VEHICLE FOR REVIEW

On the premise that there is no conflict, Sutter argues that this case involves only "fact-bound disputes regarding this particular agreement." Opp. 24; *see* Opp. 24-27. His premise is wrong for the reasons just discussed. The case squarely presents a basic question left open in *Stolt-Nielsen*: Whether a contract provision requiring arbitration rather than litigation of any dispute, without more, can be a sufficient "contractual basis [to] support a finding that the parties agreed to authorize class-action arbitration." 130 S. Ct. at 1776 n.10; *see* Pet. i; *see also* Pet. 20-26.

As to the specific agreement here, Sutter notes the arbitrator's stated reasoning that "no civil action concerning any dispute" may be brought in court; "all such disputes" are to be arbitrated; and all previously possible "civil actions," which the arbitrator would construe to include class actions, must therefore be subject to arbitration. *See* Opp. 24; *see also* Opp. 3-6; Pet. 5-10.

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[4] Sutter notes that *Reed* addresses *Jock* in its text, while expressing disagreement with the Third Circuit's decision in this case in a footnote. Opp. 11 n.4. That is unsurprising. *Jock* was decided before *Reed* was briefed, and the Fifth Circuit knew its decision would create a conflict. The Third Circuit issued its opinion in this case nearly a month after *Reed* was argued. When it did, the plaintiff-appellee in *Reed* submitted the decision to the Fifth Circuit as additional authority with the observation that "[t]he facts in *Sutter* are identical to those in the present case." *Reed*, No. 11-50509, Doc. 00511817909, at 1 (5th Cir. filed Apr. 11, 2012). From the Fifth Circuit's point of view, the new decision merely deepened the conflict.

Sutter offers no defense of this construction on the merits, beyond a passing *ipse dixit* that it is "more plausible" than Oxford's. Opp. 24. As the petition points out, however, the arbitrator's position is untenable on its face—in part because it is "disputes," not "actions," that the text requires to be arbitrated. Pet. 5 n.1, 22-23. Sutter offers no substantive response to this simple textual point.[5]

In any event, as discussed above, the language here is materially indistinguishable from that at issue in *Reed* and *Jock*. The Third and Fifth Circuits have reached conflicting results as to whether that language, without more, can or cannot be construed as an affirmative agreement to authorize class arbitration, sufficient under the FAA and *Stolt-Nielsen*. And here, as in *Reed*, there is no more. *See* Pet. 22-24. This case is thus a perfect vehicle to address whether allowing an arbitrator to impose class arbitration based on nothing more than his purported interpretation of an ordinary, broad arbitration agreement violates "the basic precept that arbitration 'is a matter of consent, not coercion.'" *Stolt-Nielsen*, 130 S. Ct. at 1773 (citations omitted); *see also id.* at 1775 ("An implicit agreement to authorize class-action arbitration ... is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate," because "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator."); *AT&T Mobility* v. *Concepcion*, 131 S. Ct. 1740, 1752 (2011) (expressing skepticism that any defendant would ever agree to class arbitration); *id.* at 1753 (class arbitration "is not arbitration as envisioned by the FAA").

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[5] Instead, he suggests that Oxford has waived the right to *make* the point. Opp. 25-26. That is not correct. Oxford has been arguing for years that the arbitration clause here cannot be read to reflect any agreement to authorize class arbitration. *E.g.*, Pet. C.A. Br. 41-44. This refutation of the arbitrator's textual analysis is just another reason why that is so. *See Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 378-379 (1995) (parties may use any argument to support a preserved claim).

III. THE QUESTION PRESENTED IS IMPORTANT

Finally, Sutter argues (Opp. 27-30) that the question presented is of "limited and declining importance," because contracting parties should now be aware of the issue and insert express class-action bans into their arbitration agreements if they wish.[6] That is not a sound basis for denying review.

As the petition points out, there are at least two pending federal appeals raising the same issue (one of them being held in abeyance), and at least two more cases that were pending on appeal have recently settled. *See* Pet. 27-28 & n.14, 29-30 & n.16.[7] Thus, including the decision below, *Jock*, and *Reed*, at least seven cases on this issue have reached the courts of appeals in just the last two years. Several district courts have also faced the question. *See* Pet. 27 & n.13. The frequency with which the issue continues to be litigated belies any suggestion that it is unimportant. And Sutter offers no answer to the petition's point (Pet. 29-30) that these reported cases, especially at the appellate level, merely scratch the surface, because of the tremendous pressure on defendants to settle cases in which class proceedings are imposed—particularly in arbitration, where there will be very limited opportunity for eventual review on the merits.

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[6] Sutter does not contest that the question presented is both recurrent and ripe for review. *See* Pet. 26-30.

[7] The Vermont Supreme Court recently remanded a case without reaching the issue. *See* Pet. 28 & n.14; *Bandler* v. *Charter One Bank*, 2012 WL 4748096, ¶ 23 n.5 (Oct. 5, 2012).

Nor is there any reason to believe that the importance of the question here will decline. As this case amply demonstrates, cases in which one party seeks class arbitration often generate years—even decades—of litigation. That is one reason why, nearly ten years after Sutter says this Court's decision in *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003), should have prompted parties to begin inserting express class arbitration bans into their contracts (Opp. 27), many such cases still remain. Another reason is that not every party seeking to "reduc[e] the cost and increas[e] the speed of dispute resolution" by invoking the "efficient, streamlined procedures" and "informality" that are the classic hallmarks of arbitration will think (or be able) to begin that process by hiring particularly sophisticated counsel of the sort who drafted the agreements at issue in cases such as *Concepcion* and *American Express Co.* v. *Italian Colors Restaurant*, No. 12-133 (cert. granted Nov. 13, 2012).[8] And, as DRI explains in its amicus brief, as a practical matter, even parties who can invest in such counsel "cannot revisit and revise all their contracts containing arbitration agreements whenever another ... decision comes along." DRI Br. 20. Thus, "[i]n the real world ... arbitrators often see—and will continue to see—contracts drafted long before anyone could reasonably have considered class arbitration a subject for negotiation." *Id.*

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[8] Moreover, as the continuing litigation in the *American Express* case makes clear, even including an express prohibition on class actions is no guarantee that an arbitration agreement will be enforced according to its terms.

The briefs supporting certiorari filed by DRI and the U.S. Chamber of Commerce likewise confirm that the question presented is of significant importance to the business community. No less than when *Stolt-Nielsen* and *Concepcion* were decided, unjustified imposition of class arbitration continues to inflate defendants' potential liability beyond expected or manageable bounds, depriving businesses of the bargained-for advantages of arbitration and creating undue pressure to settle even non-meritorious claims. Chamber Br. 16-19; DRI Br. 9-15.

Finally, it is ironic for Sutter to argue that this Court should deny review here because parties can always expressly *ban* class arbitration in their contracts. The very question addressed in *Stolt-Nielsen* was what default rule should apply in determining an arbitrator's authority to impose class arbitration when the parties' agreement did not address the issue. *See* 130 S. Ct. at 1764, 1766. The Court answered, unequivocally, that class arbitration may *not* be imposed unless the parties affirmatively "*agreed to authorize*" it. *Id.* at 1776. There is no force to Sutter's argument that it is now unimportant whether that rule, required by the FAA and forcefully explicated by this Court, will or will not be meaningfully enforced.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AND
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No. 12-135

IN THE

Supreme Court of the United States

OXFORD HEALTH PLANS LLC,
Petitioner,

v.

JOHN IVAN SUTTER, M.D.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING PETITIONER

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* SUPPORTING PETITIONER

Pursuant to Rule 37.2(b) of the Rules of this Court, the Chamber of Commerce of the United States of America hereby requests leave to file the accompanying *amicus curiae* brief in support of petitioner. The Chamber has obtained petitioner's consent, but respondent's counsel has not responded to the Chamber's requests for consent.

The question presented in this case significantly affects the interests of the Chamber and its members. The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

Many of the Chamber's members and affiliates routinely include arbitration agreements in their business contracts. Consequently, the Chamber frequently submits *amicus* briefs in cases presenting issues under the Federal Arbitration Act (FAA), including in recent cases before this Court. See, *e.g.*, *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740 (2011); *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010); *Green Tree Fin. Corp.* v. *Bazzle*, 539 U.S. 444 (2003). For a collection of the Chamber's recent *amicus* briefs in arbitration cases, see http://chamber litigation.com./cases/issue/arbitration-alternative-dispute-resolution.

Unlike litigation, private arbitration is purely a matter of consent, not coercion. By agreeing to arbitrate, parties are able to avoid costly and time-consuming litigation by submitting to a streamlined yet fair process based upon the mutual consent of the parties. Compelling parties to resolve disputes through costly, time-consuming, and high-stakes class arbitration, when the parties have not agreed to do so, frustrates the parties' intent, undermines their agreements, and erodes the benefits offered by arbitration as an alternative to litigation. Imposing class arbitration on parties who have not agreed to that procedure conflicts with the central goal of the FAA: to ensure that arbitration agreements are enforced strictly according to the terms adopted by the parties.

Parties agree to arbitrate because it offers an alternative to the dispute-resolution processes already available in courts. The FAA ensures not only that arbitration agreements are enforceable, but also that hostility to arbitration is not permitted to remake arbitration to replicate the most expensive and formal aspects of court litigation when the parties have not agreed to such procedures. The Chamber and its members thus have a vital interest in having this Court grant review and reverse the decision below, which upheld an arbitrator's decision to order class arbitration based solely on a clause—essential to any mandatory arbitration agreement—that required the parties to arbitrate rather than litigate all disputes arising from their agreement.

For these reasons, the Chamber respectfully requests that the Court grant its motion for leave to file an *amicus curiae* brief in support of petitioner.

Respectfully submitted,

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The interest of the *amicus curiae* is set forth in the accompanying motion for leave to file this brief.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution intended to fund the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties have received timely notice of *amicus curiae*'s intent to file this brief. Petitioner has consented to *amicus curiae*'s filing of this brief, but respondent's counsel did not respond to *amicus curiae*'s requests for consent.

INTRODUCTION

In *Stolt-Nielsen S.A.* v. *AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010), this Court held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 1775. Given the "foundational FAA principle that arbitration is a matter of consent," and the degree to which "class-action arbitration changes the nature of arbitration," the Court held that an arbitrator may not "presum[e] the parties consented to [class arbitration] simply by agreeing to submit their disputes to an arbitrator." *Id.* Under *Stolt-Nielsen*, an arbitrator who orders class arbitration based solely on the parties' agreement to resolve their disputes through mandatory arbitration exceeds his powers under the FAA. *Id.* at 1770.

Contrary to these principles, the decision below held that an arbitrator did *not* exceed his powers under the FAA by ordering class arbitration based solely on a standard arbitration clause—essential to a mandatory arbitration agreement—requiring the parties to arbitrate rather than litigate all disputes arising from their agreement. That decision, if upheld, would permit arbitrators to impose class arbitration on virtually any mandatory arbitration agreement, regardless of whether the parties actually consented to resolve their disputes in that manner. As this Court has recognized, class arbitration so fundamentally changes the nature and stakes of arbitration that it is "hard to believe" that any defendant would consent to such a procedure. *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1752 (2011). Under the decision below, however, an arbitrator can manufacture such "consent" from a standard "any dispute" clause and effectively insulate his decision from judicial review simply by purporting to have "interpreted" the agreement.

This would eviscerate *Stolt-Nielsen*, frustrate the legitimate contractual expectations of thousands of businesses and other parties to arbitration agreements, and subject parties to a costly and burdensome procedure that they never would have envisioned, let alone consented to, when they agreed to submit their disputes to arbitration. For these reasons, as discussed more fully below, the Court should grant the petition for certiorari and reverse the decision below.

REASONS FOR GRANTING THE PETITION

As petitioner has shown, the circuits are split as to what constitutes a sufficient contractual basis for ruling that the parties to a contract that contains an arbitration provision agreed to authorize class arbitration. Pet. 13–20. Aligning itself with the Second Circuit's decision in *Jock* v. *Sterling Jewelers Inc.*, 646 F.3d 113 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 1742 (2012), the Third Circuit in the decision below upheld an arbitrator's decision to order class certification based solely on a standard clause requiring the parties to arbitrate rather than litigate all disputes arising from their agreement. Pet. App. 14a–17a, 46a–48a. Because the arbitrator had purported to "articulate a contractual basis for his decision," which the panel found not "totally irrational," the court refused to determine independently whether ordering class arbitration exceeded the arbitrator's power under the agreement. *Id.* at 14a, 17a; *accord Jock*, 646 F.3d at 127 (upholding arbitrator's conclusion that "any dispute" clause authorized class arbitration because his conclusion was not "manifestly wrong").

In stark conflict with these decisions, the Fifth Circuit has correctly held that, under the FAA, a standard "any dispute" clause is "not a valid contractual basis upon which to conclude that the parties agreed to submit to class arbitration," regardless of an arbitrator's purported discovery of such an agreement in the clause's general terms. *Reed* v. *Fla. Metro. Univ., Inc.*, 681 F.3d 630, 641–46 (5th Cir. 2012). Given the "fundamental differences between bilateral arbitration and class arbitration" that this Court identified in *Stolt-Nielsen* and *Concepcion*, the Fifth Circuit properly held that an agreement to submit to class arbitration "should not be lightly inferred," *id.* at 639–40, and that courts must "ensure that an arbitrator has a legal basis for his class arbitration determination," an inquiry which "necessarily requires some consideration of the arbitrator's award and rationale," *id.* at 645. In so holding, the Fifth Circuit expressly "part[ed] ways" with the Second Circuit's decision in *Jock*, *id.* at 646, and "disagree[d]" with the Third Circuit's decision here for "essentially the [same] reasons," *id.* at 644 n.13.

This square and acknowledged circuit split is alone sufficient reason to grant certiorari. Most arbitration contracts include some form of "any dispute" clause, and many companies use a single, uniform arbitration agreement throughout their operations nationwide. Whether a company is subject to the significant burdens attending class arbitration under an agreement governed by the FAA should not depend on whether suit is brought in New York, New Jersey, or Texas. Moreover, the number of corporations that are either headquartered or incorporated in the Second and Third Circuits is vast, which means that plaintiffs will readily forum-shop to get the benefit of the law in those circuits. The Court should grant review to restore uniformity and predictability to this critically important area of the law.

The Chamber submits this brief to amplify two additional reasons this case warrants the Court's review. *First*, the decision below is fundamentally incompatible with this Court's holding in *Stolt-Nielsen* that, under the FAA, arbitrators may not infer an agreement to authorize class arbitration solely from the fact that the parties agreed to submit their disputes to mandatory arbitration. By rubber-stamping the arbitrator's decision to order class arbitration based solely on the arbitration agreement's general "any dispute" clause—standard language that appears in many arbitration provisions—the decision below for all practical purposes nullifies this Court's holding in *Stolt-Nielsen*. If allowed to stand, the rule adopted by the Third Circuit below and the Second Circuit in *Jock* would permit arbitrators to impose class arbitration on virtually any arbitration agreement, contrary to *Stolt-Nielsen*'s core teaching that, under the FAA, class arbitration is a matter of consent, not coercion, and may not be compelled absent a contractual basis for finding that the parties agreed to resolve their disputes in that manner.

Second, the question presented is important because, as this Court stressed in *Stolt-Nielsen* and *Concepcion*, class arbitration fundamentally alters the nature and stakes of arbitration. Class arbitration dramatically increases the risk defendants face from an adverse decision by a single arbitrator whose decision is effectively unreviewable, allowing plaintiffs' lawyers to pressure defendants into settling nonmeritorious claims. And it transforms arbitration from a speedy, informal, and inexpensive means of resolving disputes into a virtual carbon copy of trial litigation, but without the benefit of rigorous appellate review and the certainty and repose of a judgment that binds absent class members. As this Court observed, it is "hard to believe" that any defendant would agree to class arbitration, *Concepcion*, 131 S. Ct. at 1752—let alone that it would do so simply by agreeing to submit all disputes arising from the parties' contract to mandatory arbitration.

I. THE DECISION BELOW DEPRIVES THIS COURT'S DECISION IN *STOLT-NIELSEN* OF PRACTICAL SIGNIFICANCE.

In *Stolt-Nielsen*, this Court granted certiorari "to decide whether imposing class arbitration on parties whose arbitration clauses are 'silent' on that issue is consistent with the [FAA]." 130 S. Ct. at 1764. The arbitration clause in that case provided that "'[a]ny dispute arising from the making, performance or termination'" of the parties' contract would be settled in arbitration. *Id.* at 1765. The parties had stipulated that "the arbitration clause was 'silent' with respect to class arbitration," *i.e.*, that "'no agreement'" had been reached on that issue. *Id.* at 1766. The arbitrators nonetheless ordered the parties into class arbitration, concluding that "the arbitration clause allowed for class arbitration" because the defendants had failed to "show an intent to preclude class arbitration," and because otherwise there would be "no basis for a class action absent express agreement among all parties and the putative class members." *Id.* (internal quotation marks and alteration omitted).

This Court held that the arbitrators had exceeded their powers under the FAA by ordering class arbitration without a contractual basis. *Id.* at 1767–76. While recognizing that "the interpretation of an arbitration agreement is generally a matter of state law," the Court concluded that the "FAA imposes certain rules of fundamental importance, including the basic precept that arbitration is a matter of consent, not coercion." *Id.* at 1773 (internal quotation marks omitted). Because "the central or 'primary' purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms," in enforcing and construing arbitration provisions, both "courts and arbitrators must give effect to the contractual rights and expectations of the parties." *Id.* at 1773–74 (internal quotation marks omitted). "This is because an arbitrator derives his or her powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution." *Id.* at 1774 (citing *AT&T Techs., Inc.* v. *Commc'ns Workers*, 475 U.S. 643, 648–49 (1986)).

Given the "foundational FAA principle that arbitration is a matter of consent," the Court held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 1775. Further, because class arbitration "fundamental[ly] changes" the nature of arbitration, the Court held that, under the FAA, an arbitrator may not infer an "implicit agreement to authorize class-action arbitration . . . solely from the fact of the parties' agreement to arbitrate." *Id.* at 1775–76. In other words, in construing an arbitration clause, an arbitrator may not "presum[e] the parties consented to [class arbitration] by simply agreeing to submit their disputes to an arbitrator." *Id.* at 1775; *see also id.* at 1776 ("the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings").

The decision below cannot be reconciled with *Stolt-Nielsen*. By upholding the arbitrator's decision to order class arbitration based on nothing more than a standard "any dispute" clause, the decision below contravenes *Stolt-Nielsen*'s holding that a bare agreement to arbitrate all disputes arising from the parties' agreement is not a sufficient contractual basis for ordering class arbitration. And by refusing to subject the arbitrator's "interpretation" of the agreement to meaningful judicial scrutiny, the decision below gives arbitrators virtually unfettered discretion to impose class arbitration on almost any arbitration agreement, contrary to *Stolt-Nielsen*'s holding that, under the FAA, class arbitration is a matter of consent, not coercion.

A. The Decision Below Conflicts With *Stolt-Nielsen*'s Holding That An Agreement To Authorize Class Arbitration Cannot Be Inferred Solely From The Parties' Agreement To Arbitrate Their Disputes.

The decision below is squarely at odds with *Stolt-Nielsen*'s holding that arbitrators may not infer an agreement to authorize class arbitration under the FAA solely from the parties' agreement to arbitrate their disputes. The arbitrator in this case inferred an agreement to authorize class arbitration from standard arbitration language providing that "[n]o civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration." Pet. App. 93a. The decision below is no less "at war with the foundational FAA principle that arbitration is a matter of consent" than the arbitrators' decision in *Stolt-Nielsen*. 130 S. Ct. at 1775.

Most arbitration provisions contain a general clause requiring the parties to arbitrate "any" or "all" disputes relating a specified subject matter. See *Reed*, 681 F.3d at 642 ("The 'any dispute' clause is a standard provision that may be found, in one form or another, in many arbitration agreements."); *Complaint of Hornbeck Offshore (1984) Corp.*, 981 F.2d 752, 755 (5th Cir. 1993) (collecting cases involving such clauses). Indeed, the American Arbitration Association's guidance on drafting arbitration agreements suggests the following standard language: "Any controversy or claim arising out of or relating to this contract . . . shall be settled by arbitration." American Arbitration Association, *Drafting Dispute Resolution Clauses: A Practical Guide* 7 (Sept. 1, 2007); *see also* JAMS ADR Clauses (Jan. 1, 2011), http://www.jamsadr.com/clauses ("Any dispute, claim or controversy arising out of or relating to this Agreement . . . shall be determined by arbitration"). Ironically, the arbitration agreement this Court held insufficient to authorize class arbitration in *Stolt-Nielsen* included such a clause. 130 S. Ct. at 1765 (clause requiring "'[a]ny dispute'" arising from the parties' contract to be settled by arbitration).

Such a clause reflects nothing more than "the fact of the parties' agreement to arbitrate." *Id.* at 1775. By its terms, a general clause requiring all disputes arising from the parties' contract to be submitted to arbitration establishes only that the parties agreed to arbitrate rather than litigate their disputes, and says nothing whatsoever about whether they agreed to authorize class arbitration. As *Stolt-Nielsen* made clear, the ability to represent a class is not somehow inherent in the concept of arbitration such that a court or arbitrator would be justified in supplying such a term as "necessary to give effect to the parties' agreement." *Id.* To the contrary, the Court held, "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Id.* Under *Stolt-Nielsen*, therefore, a clause that simply requires parties to arbitrate rather than litigate their disputes is "not a valid contractual basis upon which to conclude that the parties agreed to submit to class arbitration." *Reed*, 681 F.3d at 643; see also Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 Marq. L. Rev. 1103, 1155 (2011) ("A general arbitration clause, according to the *Stolt-Nielsen* Court, does not authorize class arbitration because class arbitration differs too much from individual arbitration.").

Thus, if the arbitration agreement at issue here had included only the second clause ("all such disputes shall be submitted to final and binding arbitration"), it would scarcely be debatable that the arbitrator exceeded his powers under the FAA by ordering class arbitration. The arbitrator, however, purported to discern an intent to authorize class arbitration in the initial clause providing that "'[n]o civil action concerning any dispute arising under this Agreement shall be instituted before any court.'" See Pet. App. 47a. But that clause cannot be enough to take this case outside *Stolt-Nielsen*, for it simply confirms that the agreement to arbitrate disputes covered by the agreement is mandatory rather than permissive, *i.e.*, that the parties have agreed to resolve their dispute through arbitration and thus have waived their right to litigate those disputes in a civil action in court. The "no civil action" clause merely precludes resort to litigation and adds nothing to the arbitrator's authority to resolve "all such disputes" arising under the parties' agreement. Accordingly, both clauses reflect only "the parties' agreement to arbitrate." *Stolt-Nielsen*, 130 S. Ct. at 1775. Under *Stolt-Nielsen*, that is not a sufficient "contractual basis for concluding that the party *agreed*" to class arbitration. *Id.* "[T]he FAA requires more." *Id.* at 1776.

B. The Decision Below Undermines The FAA's Consent Requirement By Refusing To Scrutinize The Contractual Basis For Ordering Class Arbitration.

The decision below further undermines *Stolt-Nielsen* by refusing to subject the arbitrator's decision to order class arbitration to meaningful judicial scrutiny. See Pet. App. 17a (refusing to disturb the arbitrator's decision because the court found it not "totally irrational"). By treating the question whether the parties agreed to authorize class arbitration as just another question of state-law contract interpretation committed to the arbitrator, the court of appeals essentially gave arbitrators *carte blanche* to impose class arbitration on any arbitration agreement, so long as they purport to base their decision on "interpretation" of the agreement. *Id.* That result is not faithful to the teachings of *Stolt-Nielsen*.

The core flaw in the court of appeals' analysis is its failure to recognize that under *Stolt-Nielsen*, whether the parties agreed to authorize class arbitration is not simply a question of state-law contract interpretation. Rather, *Stolt-Nielsen* holds that the FAA places independent limitations on an arbitrator's power to order class arbitration. See 130 S. Ct. at 1773 ("While the interpretation of an arbitration agreement is generally a matter of state law, the FAA imposes certain rules of fundamental importance") (citation omitted). Although the Court in *Stolt-Nielsen* did not have occasion to define exhaustively those limitations, the Court's holding entails at least the following two propositions: (1) when the parties have not reached an agreement as to class arbitration, federal substantive law supplies the default rule—the parties may not be compelled to submit to class arbitration; and (2) as a matter of federal law under the FAA, a contract term that merely evidences the parties' agreement to arbitrate rather than litigate their disputes is an insufficient basis upon which to impose class arbitration. See *id.* at 1775–76.

Meaningful judicial review is necessary to ensure that arbitrators respect "their limited powers under the FAA" to order class arbitration. *Id.* at 1776. Where, as here, an arbitrator has purported to discover an intent to authorize class arbitration in a standard clause requiring the parties to submit all their disputes to arbitration, a reviewing court must do more than merely ensure that the arbitrator's interpretation of the contract is not "totally irrational"; it must ensure that the arbitrator's decision is consistent with the FAA's substantive requirements. As the Fifth Circuit properly held in *Reed*, given the fundamental FAA principle that arbitration is a matter of consent, and given the extent to which class arbitration differs from traditional bilateral arbitration, courts must "ensure that an arbitrator has a legal basis for his class arbitration determination, even when applying the appropriately deferential standard of review," and "[s]uch an analysis necessarily requires some consideration of the arbitrator's award and rationale." 681 F.3d at 645.

A contrary rule would allow arbitrators to subvert the FAA's consent requirement under the guise of "interpretation." Under the approach adopted by the Third Circuit below and the Second Circuit in *Jock*, as long the arbitrator incants the magic words that he is "interpreting" the agreement and attempting to divine the parties' "intent," a decision to order class arbitration is immune from meaningful judicial scrutiny. This is no idle concern. Prior to this Court's decision in *Stolt-Nielsen*, an arbitrator in one case concluded that the agreement permitted class arbitration even though it provided that the customer "'will not participate in any class action lawsuit in connection with any [arbitrable] dispute.'"[2] In another case, the arbitrator ordered class arbitration even though the agreement stated that no arbitration "'shall include, by consolidation, joinder, or in any other manner, any person other than [claimant] and [respondent].'"[3]

The arbitrator's "interpretation" of the parties' agreement here is likewise indefensible. As discussed, the clause on which the arbitrator relied says nothing about class arbitration, but merely reflects the parties' agreement to arbitrate, rather than litigate, any disputes arising from their contract. There is simply no basis for the arbitrator's conclusion that this clause "vest[s] in the arbitration process everything that is prohibited from the court process." Pet. App. 47a. If that were true, then presumably the parties would be entitled to a jury trial and all the other procedural rights attending civil litigation as well. But the entire reason parties agree to arbitration is to *forgo* the procedural rigor and associated burdens of litigation. *Cf. Concepcion*, 131 S. Ct. at 1747 (rejecting notion that an arbitration agreement can be deemed unconscionable if it fails to afford all procedures inherent in litigation). As the Fifth Circuit correctly held, "the mere fact that the parties would otherwise be subject to class action in the absence of an arbitration agreement is not a sufficient basis to conclude that they agreed to class arbitration when they entered into an arbitration agreement." *Reed*, 681 F.3d at 643. The arbitrator's contrary conclusion here has no basis in the parties' actual consent to class arbitration, and the arbitrator therefore exceeded his powers under the FAA by ordering class arbitration.

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[2] Partial Final Clause Construction Award, *Jones* v. *Genus Credit Mgmt. Corp.*, AAA Case No. 11 181 00295 05, slip op. at 2 (Oct. 13, 2005) (emphasis omitted).

[3] Preliminary Award on Hobby's Request to Allow Class Action (Clause Construction Award), *Hobby* v. *Snap-on Tools Co., LLC*, AAA Case NO. 11 114 01884 04, slip op. at 4 (June 8, 2005) (emphasis omitted).

C. The Decision Below Would Allow Arbitrators To Impose Class Arbitration On Virtually Any Arbitration Agreement.

For these reasons, the rule adopted by the Third Circuit below and the Second Circuit in *Jock* is incompatible with *Stolt-Nielsen*. At a minimum, it renders *Stolt-Nielsen* "an insignificant precedent." *Jock*, 646 F.3d at 129 n.2 (Winter, J., dissenting). For all intents and purposes, these circuits have confined *Stolt-Nielsen* to cases in which the parties have stipulated that they reached no agreement as to class arbitration. But "[i]f *Stolt-Nielsen* resolves only the effect of a *sui generis* and idiosyncratic stipulation of the parties," *id.*, the Court's decision in that case will have no prospective application. Such stipulations are undoubtedly rare under ordinary circumstances, and will surely be nonexistent after *Stolt-Nielsen*.

The result would be that arbitrators would have essentially unfettered discretion to expand the scope of their authority beyond the parties' agreement by ordering class arbitration, regardless of whether the parties actually agreed to that procedure in any meaningful sense, contrary to "the foundational FAA principle that arbitration is a matter of consent." *Stolt-Nielsen*, 130 S. Ct. at 1775. With this unfettered discretion, nothing would prevent arbitrators from concluding (based on their "interpretation" of the parties' agreement) that any arbitration agreement containing a standard "any dispute" clause authorizes class arbitration because, in the arbitrator's view, the broad language manifests an intent to authorize in arbitration all actions, including class actions, that could have otherwise been brought in court.

This would frustrate the legitimate expectations of thousands of companies that have entered into arbitration agreements containing "any dispute" clauses. Countless such arbitration provisions exist and will generate future disputes. Thus, even if companies could draft around the decision below in future agreements, this Court's review is necessary to prevent the lower courts from undermining their existing agreements. These companies would never have imagined that by agreeing to submit their disputes to arbitration and precluding resort to litigation they were subjecting themselves to the significant burdens and risks of class arbitration. Indeed, the very concept of class arbitration is a relatively recent development.[4] Given the limited commercial history of class arbitration, including, until very recently, the lack of any guidance regarding how such an arbitration should actually proceed, it would be fanciful to believe that the parties consented to class arbitration merely by agreeing to submit all their disputes to mandatory arbitration.

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[4] Although the FAA was enacted in 1925, the first serious analysis of class arbitration occurred more than 50 years later. *See* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1, 38 (2000) (citing *Keating* v. *Superior Court*, 167 Cal. Rptr. 481 (Cal. Ct. App. 1980)). And the American Arbitration Association did not publish rules addressing class arbitrations until 2003, after this Court's decision in *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003).

In short, to protect parties' legitimate contractual expectations under the FAA, and to prevent the lower courts from rendering *Stolt-Nielsen* a dead letter, the Court should grant the petition for certiorari and reverse the decision below.

II. CLASS ARBITRATION FUNDAMENTALLY CHANGES THE NATURE AND STAKES OF ARBITRATION.

Three times in the last decade this Court has granted certiorari to address questions concerning class arbitration. See *Concepcion*, 131 S. Ct. 1740; *Stolt-Nielsen*, 130 S. Ct. 1758; *Green Tree Fin. Corp.* v. *Bazzle*, 539 U.S. 444 (2003). The volume of litigation and the persistence of the issues surrounding class arbitration reflect both the continuing legal uncertainty regarding the proper standards governing class arbitration and the enormous stakes for the parties to arbitration agreements. Indeed, at stake may well be the ongoing viability of private dispute resolution as an alternative to civil litigation. These issues are no less pressing today than they were when this Court granted certiorari in *Concepcion*, *Stolt-Nielsen*, and *Bazzle*.

The business community is particularly concerned about the rule adopted by the Second and Third Circuits because, as this Court has now recognized on two separate occasions, class arbitration "fundamental[ly] changes" the nature and stakes of arbitration. *Stolt-Nielsen*, 130 S. Ct. at 1776; *accord Concepcion*, 131 S. Ct. at 1748 ("classwide arbitration interferes with fundamental attributes of arbitration"). Given the significant burdens and risks associated with class arbitration, a rule that allows arbitrators to infer an agreement to authorize class arbitration from a standard "any dispute" clause renders the FAA's bedrock requirement of consent a fiction and is simply inconsistent with economic reality. See *Concepcion*, 131 S. Ct. at 1752 (finding it "hard to believe" that companies would ever agree to class arbitration). The Chamber here highlights three ways in which improperly compelling class arbitration fundamentally transforms the bargain the parties struck when they agreed to bilateral arbitration.

A. Class Arbitration Greatly Raises The Stakes Of Arbitration, Pressuring Defendants To Settle Questionable Claims.

First, class arbitration dramatically increases the stakes of arbitration and the risk to defendants of an adverse decision. In a class arbitration, the arbitrator's decision "no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties." *Stolt-Nielsen*, 130 S. Ct. at 1776. As a result, the defendant's financial exposure is magnified exponentially. Even if the defendant would face the same number of individual claims, resolving those claims through multiple bilateral arbitrations allows the defendant to spread the risk of an erroneous decision across multiple decisionmakers. Class arbitration, by contrast, concentrates that risk in a single proceeding, forcing the defendant to stake potentially devastating liability on a single roll of the arbitration dice. See *Concepcion*, 131 S. Ct. at 1752; *Bazzle*, 539 U.S. at 459 (Rehnquist, C.J., dissenting) (class arbitration "concentrat[es] all of the risk of substantial damages awards in the hands of a single arbitrator").

These concerns are compounded by the lack of meaningful judicial review of the arbitrator's award. As this Court has recognized, the narrow scope of judicial review makes arbitration "poorly suited to the higher stakes of class litigation." *Concepcion*, 131

S. Ct. at 1752; see also *Stolt-Nielsen*, 130 S. Ct. at 1776 ("the commercial stakes of class-action arbitration are comparable to those of class-action litigation, even though the scope of judicial review is much more limited") (citation omitted). Class arbitration forces defendants to "bet the company with no effective means of review." *Concepcion*, 131 S. Ct. at 1752.

Given these dynamics, class counsel can use the threat of class arbitration to extort settlements from defendants regardless of the ultimate merits of the underlying claims. Even when a company has a meritorious defense, "the risk of an error will often become unacceptable." *Id.* "Defendants are willing to accept the costs of these errors in [bilateral] arbitration, since their impact is limited to the size of individual disputes, and presumably outweighed by savings from avoiding the courts." *Id.* But when a single erroneous decision could cripple the company, few defendants will have the fortitude to press on, even if they are likely to prevail. "Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *Id.* This "'in terrorem'" effect of class-action litigation is well documented, "and class arbitration would be no different." *Id.*

B. Class Arbitration Defeats The Primary Advantages Of Arbitration By Increasing Its Cost, Length, And Complexity.

Second, class arbitration greatly increases the cost, duration, and procedural complexity of arbitration. Arbitration is viewed as an attractive alternative to litigation, particularly for resolving small claims, precisely because it offers "'streamlined proceedings and expeditious results.'" *Preston* v. *Ferrer*, 552 U.S. 346, 357 (2008); see also *Hall Street Assocs., L.L.C.* v. *Mattel, Inc.*, 552 U.S. 576, 588 (2008) (emphasizing "arbitration's essential virtue of resolving disputes straightaway"); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985) ("it is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts [parties] to forgo access to judicial remedies" in favor of arbitration).

Class arbitration, by contrast, "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Concepcion*, 131 S. Ct. at 1751. Before even reaching the merits of the parties' claims, the arbitrator "must first decide, for example, whether the class itself may be certified, whether the named parties are sufficiently representative and typical, and how discovery for the class should be conducted." *Id.* The AAA's rules, moreover, contemplate significant judicial involvement in this process, providing for stays of the proceedings to allow parties to seek judicial review of both the arbitrator's conclusion that the arbitration agreement authorizes class arbitration and the arbitrator's decision to certify a class. Pet. App. 96a–97a (Rules 3, 5(b)). The predictable result is that class arbitrations take much longer and cost much more to resolve than bilateral arbitrations—if they are ever litigated to a final decision at all. See *Concepcion*, 131 S. Ct. at 1751 (citing statistics showing that class arbitrations take on average 3.5 times longer than bilateral arbitrations and rarely result in an award on the merits).

C. Class Arbitration May Not Bind Absent Class Members To A Defense Judgment.

Finally, it remains unclear whether class arbitration is even capable of yielding a binding judgment in the defendant's favor. Whether and under what conditions a defense award from an FAA arbitration may be enforced against absent class members is a critical but unsettled question. Even if the arbitrator observes all the procedural formalities required to bind absent class members to a court judgment, see *id.* (discussing requirements of notice, opportunity to be heard, and right to opt out), absent class members may argue that they are not bound by the arbitrator's decision, for example, because their arbitration agreements do not authorize class arbitration, because they were not afforded their contractual right to participate in the selection of the arbitrator, or for some other reason. As a result, class arbitration may not even yield one of the most basic benefits of bilateral arbitration—a "mutual, final, and definite award." 9 U.S.C. § 10(a)(4).

Given these significant disadvantages of class arbitration, many companies, given the option, would simply abandon arbitration altogether in favor of litigation, where at least the delays and expense would buy them meaningful appellate review and a final and binding judgment. Indeed, it is precisely for these reasons that the Court in *Concepcion* found it "hard to believe" that defendants would *ever* consent to class arbitration. 131 S. Ct. at 1752. And it is precisely for these reasons that the Court in *Stolt-Nielsen* held that class arbitration so fundamentally changes the nature of arbitration that arbitrators may not "presume, consistent with their limited powers under the FAA," that the parties agreed to authorize class arbitration merely by agreeing to submit their disputes to arbitration. 130 S. Ct. at 1776. The decision below disregards this Court's teachings on class arbitration and should be reversed.

CONCLUSION

For these reasons, and those stated by petitioner, the Chamber urges the Court to grant the petition for certiorari and reverse the decision below.

Respectfully submitted,

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AND
BRIEFS

No. 12-135

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Petitioner,

v.

JOHN IVAN SUTTER, M.D.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION OF DRI – THE VOICE OF THE DEFENSE BAR FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* SUPPORTING PETITIONER

Pursuant to Rule 37.2(b) of the Rules of this Court, DRI – The Voice of the Defense Bar ("DRI") hereby requests leave to file the accompanying *amicus curiae* brief in support of petitioner. DRI has obtained petitioner's consent, but respondent's counsel has not responded to the DRI's request for consent.

The question presented in this case significantly affects the interests of DRI and its members. DRI is an international organization of more than 23,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Consistent with this commitment, DRI seeks to address issues germane to defense attorneys, to promote the role of the defense attorney, and to improve the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair and efficient. To that end, DRI regularly files *amicus curiae* briefs in cases that raise issues of concern to its members.

Arbitration is an issue of particular interest since DRI members often advise or represent clients with respect to the enforceability of arbitration agreements. Indeed, DRI has submitted several *amicus* briefs in recent years in cases presenting issues under the Federal Arbitration Act (FAA) before this Court. *See, e.g.*, *Am. Express Co. v. Italian Colors Restaurant*, No. 12-133 (petition for cert. filed July 30 2012); *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010).

Unlike litigation, private arbitration is purely a matter of consent, not coercion. By agreeing to arbitrate, parties are able to avoid costly and time consuming litigation by submitting to a streamlined yet fair process based upon the mutual consent of the parties. Compelling parties to resolve disputes through costly, time-consuming, and high-stakes class-wide arbitration, when the parties have not agreed to do so, frustrates the parties' intent, undermines their agreements, and erodes the benefits offered by arbitration as an alternative to litigation. Imposing class arbitration on parties who have not agreed to that procedure conflicts with the central goal of the FAA: to ensure that arbitration agreements are enforced strictly according to the terms adopted by the parties. Parties agree to arbitration because it offers an alternative to the dispute-resolution processes already available in courts. The FAA ensures not only that arbitration agreements are enforceable, but also that hostility to arbitration is not permitted to transform arbitration by replicating the most expensive and formal aspects of court litigation when the parties have not agreed to do so.

DRI and its members thus have a vital interest in the issues raised in the petition. The Third Circuit held that the parties agreed to class-wide arbitration based solely on a clause in individual contracts that – without saying a word about class arbitration – merely required the parties to arbitrate all disputes arising from their contract. Drawing on its members' extensive practical experience, DRI is uniquely well suited to explain why this Court should grant review and reverse a decision that is flatly inconsistent with Supreme Court precedent. If allowed to stand, the decision below will adversely affect the judicial system and the rule of law by subjecting parties to expensive, protracted proceedings to which they never agreed when contracting for arbitration.

For these reasons, DRI respectfully requests that the Court grant its motion for leave to file an *amicus curiae* brief in support of petitioner.

Respectfully submitted,

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BRIEF OF DRI – THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* SUPPORTING PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The interest of the *amicus curiae* is set forth in the accompanying motion for leave to file this brief.

INTRODUCTION

Arbitration is favored under federal law and the laws of many states because it is inexpensive, streamlined, and efficient. As this Court has recognized, class arbitration is, by contrast, a markedly different procedure that offers none of these advantages. It is costly, risky, and cumbersome – the very attributes that generally motivate parties to choose traditional arbitration over litigation in the first place.

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[1] Counsel of record received notice more than 10 days prior to the due date that *amicus* intended to file this brief. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

The Third Circuit charted a course that is incompatible with this Court's guidance, particularly in *Stolt-Nielsen*, that an arbitrator may not order classwide arbitration when an arbitration agreement is "silent" on class arbitration. Here, the arbitrator committed that exact error even though the contract makes no mention of class claims, class procedures, or class arbitration. Pet. App. 37a-42a.

This brief addresses reasons the Court should resolve the substantial, recurring issue presented in this case. Arbitration agreements are commonplace in every corner of the economy, and parties have come to expect that such agreements will be honored in accordance with their terms.

REASONS FOR GRANTING THE PETITION

The petition shows, in compelling detail, how this case satisfies the primary purposes of certiorari jurisdiction over judgments from the federal courts of appeal: to secure uniformity of decisions among the circuits and to resolve questions of importance to the public interest. *See, e.g., Braxton v. United States,* 500 U.S. 344, 347-48 (1991); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 43-44 (1983); *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923). *See also U.S. Courts of Appeal are Split on the Interpretation of Stolt-Nielsen on Class Actions,* 67-JUL Disp. Resol. J. 4 (May-July 2012) (noting split and suggesting "that additional post-*Concepcion* guidance by the United States Supreme Court would be welcome"); Zupanec, *Law and Motion*, 27 No. 7 Federal Litigator (July 2012) (similar). Accordingly, this brief will not rehearse the existing, and growing, intercircuit conflict. In truth, the irreconcilable split in the circuits is only the tip of the iceberg, as this issue has proven to be extraordinarily vexing to trial courts.[2]

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[2] Many district courts have allowed classwide arbitration in the absence of any explicit assent–often for the same reasons articulated by the court of appeals here. *See, e.g., Yahoo! Inc. v. Iversen*, 836 F. Supp.2d 1007, 1012-13 (N.D. Cal. 2011); *Smith & Wollensky Rest. Group, Inc. v. Passow*, 2011 WL 148302, at *1 (D. Mass. Jan. 18, 2011); *La. Health Serv. Indem. Co. v. Gambro A B*, 756 F. Supp. 2d 760, 762 (W.D. La. 2010). In contrast, many other district courts have correctly concluded, as compelled by *Stolt-Nielsen*, that class-wide arbitration is impermissible under an arbitration agreement that is altogether silent on the topic. *See, e.g., Bernal v. Burnett*, 2011 WL 2182903 at *3, *8 (D. Colo. June 6, 2011); *D'Antuono v. Service Road Corp.*, 789 F. Supp. 2d 308, 337, 344 (D. Conn. 2011); *Sutherland v. Ernst & Young LLP*, 768 F. Supp. 2d 547, 554 (S.D.N.Y. 2011); *United Food & Comm'l Workers, Local 21 v. Multicare Health Sys.*, 2011 WL 834141, at *3 (W.D. Wash. Mar. 3, 2011); *In re Checking Account Overdraft Litig.*, 2010 WL 3361127, at *2 (S.D. Fla. Aug. 23, 2010).

Likewise, consistent with the court of appeals here and the majority opinion in *Jock v. Sterling Jewelers, Inc.*, 646 F.3d 114, 119-27 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 1742 (2012), many district courts have latched onto the stipulation in *Stolt-Nielsen* to justify an incorrectly narrow reading of that case. *See, e.g., S. Comm's Servs., Inc. v. Thomas*, 829 F. Supp.2d 1324, 1338 (N.D. Ga. 2011) (agreeing with *Jock* because, *inter alia*, that "court distinguished *Stolt-Nielsen* on the facts because although the plaintiffs at one point conceded the agreement was silent regarding class arbitration, this was not the same thing as stipulating the parties had reached no agreement on the issue");

I. THE DECISION BELOW MISREADS THIS COURT'S PRECEDENTS

Prior to *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), it was generally agreed that "absent an express provision in the parties' arbitration agreement, the duty to rigorously enforce arbitration agreements 'in accordance with the terms thereof' as set forth in section 4 of the FAA bars district courts from . . . requir[ing] consolidated arbitration, even where consolidation would promote the expeditious resolution of related claims." *Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269, 274-75 (7th Cir. 1995) (citing numerous circuit decisions holding same).

After *Bazzle* – and based on a misperception of this Court's disposition – some courts concluded that class arbitration could proceed as long as the contract did not "forbid" class arbitration. In other words, class arbitration proceeded if the agreement was merely "silent" on the issue. *See, e.g., Shroyer v. New Cingular Wireless Servs.*, 498 F.3d 976, 992 (9th Cir. 2007) (reading *Bazzle* to be an "implicit endorsement" of class arbitration); *Trumper v. Travelers Indem. Co.*, 2006 WL 6553086, at *1 (S.D. Tex. Jan. 9, 2006)

Opalinski v. Robert Half Corp., 2011 WL 4729009, at *3 (D. N.J. Oct. 6, 2011) (similar reasoning); *Aracri v. Dillard's, Inc.*, 2011 WL 1388613, at *4 (S.D. Ohio Mar. 29, 2011) (same). In contrast, consistent with *Reed v. Fla. Metro. Univ. Inc.*, 681 F.3d 630, 638-46 (5th Cir. 2012) and the *Jock* dissent (646 F.3d at 127-33 (Winter, J., dissenting)), other district courts have expressly rejected the argument that *Stolt-Nielsen* applies only where the parties "stipulated that there was no agreement between them to arbitrate class claims." *Goodale v. George S. May Int'l Co.*, 2011 WL 1337349, at *2 (N.D. Ill. Apr. 5, 2011) (no agreement to class arbitration when agreement was silent; characterizing attempt to distinguish *Stolt-Nielsen* as an attempt to "split the finest of hairs").

("class arbitration is permissible under the FAA wherever the governing contract does not expressly prohibit such arbitration"; citing *Bazzle*).

Such rulings led to an explosion of classwide arbitrations. The American Arbitration Association ("AAA") and the Judicial Arbitration & Mediation Services ("JAMS") implemented class arbitration procedures for the first time. *See* AAA Supp. Rules for Class Arbitrations (eff. Oct. 8, 2003), *available at* http://adr.org/sp.asp?id=21936; JAMS Class Action Procedures (eff. Feb. 2005), *available at* http://www.jamsadr.com/files/Uploads/Documents/JAMS_Class_Action_Procedures-2005.pdf. As a mechanism for arbitrators to decide the availability of class arbitration in a given case, both the AAA and JAMS procedures call for a "clause construction" award that determines not whether the parties actually "agreed" to class arbitration, but merely whether the contract "permits" class arbitration. *See* AAA Supplementary Rules for Class Arbitrations, Rule 3; JAMS Class Action Procedures, Rule 2.

Since arbitrators viewed their task at that stage as solely to determine, in effect, whether the arbitration agreement *did not forbid* class actions (and thereby "permitted" them), it is not surprising that arbitrators interpreted silent arbitration agreements to "permit" class actions – and thereby ordered class arbitration to proceed – in overwhelming numbers. A study found that as of August 2008, 65 out of 67 silent arbitration agreements - or 97% - had been interpreted by arbitrators to authorize class arbitration. Baker, *Class Action Arbitration*, 10 Cardozo J. of Conflict Resol. 335, 348 (2009). To the same effect, the AAA *amicus* brief in *Stolt-Nielsen* reported that in 102 "clause construction awards" where the parties contested whether class arbitration was permitted, class arbitration prevailed in 95 cases. Brief of American Arbitration Association at 22, *Stolt-Nielsen v. AnimalFeeds Int'l Corp.*, No. 08-1198, available at http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_07_08_08_1198_NeutralAmCuAAA.authcheckdam.pdf; *see also* Brief of CTIA - The Wireless Association at 11 & Appendix, *Stolt-Nielsen v. AnimalFeeds Int'l Corp.*, No. 08-1198, *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-1198_PetitionerAmCuCTIA.pdf.

This empirical data is supported by comments from the arbitrators themselves. As one arbitrator acknowledged:

> the overwhelming majority of Clause Construction Awards under [AAA] Class Arbitration Rules have held that, where the arbitration clause contains broad language similar to that here, and is silent on whether a class proceeding is contemplated or not, class arbitration is permitted.

Partial Final Clause Construction Award And Rulings on Respondents' Motions To Dismiss at 9, *Depianti v. Bradley Mktg Enters., Inc.*, AAA No. 11 114 00838 07 (AAA Aug. 1, 2008) *available at* http://www.adr.org/si.asp?id=5442; *accord* Clancy, *Re-Evaluating Bazzle: the Supreme Court's Celebrated 2003 Decision Says Much Less About Class Action Arbitration Than Many Assume*, 7 Class Action Lit. Rept. (BNA) 649, at p. 2 (Sept. 22, 2006) (noting that arbitrators issuing decisions overwhelmingly favor class arbitration – even where there is no evidence the parties intended to allow it).

This was the pertinent legal landscape until this Court explained in *Stolt-Nielsen* that

> [A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so. . . . The critical point, in the view of the arbitration panel, was that petitioners did not establish that the parties to the charter agreements intended to *preclude* class arbitration. . . . [T]he panel regarded the agreement's silence on the question of class arbitration as dispositive. The panel's conclusion is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent.

130 S.Ct. at 1775 (emphasis in original; internal quotations and citations omitted).

This Court anchored its holding on the bedrock principle that arbitration under the FAA is based on "consent, not coercion." *Id.* at 1773 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.,* 489 U.S. 468, 479 (1989)). Because "[t]he central purpose" of the FAA is "to ensure 'that private agreements to arbitrate are enforced according to their terms,'" parties may structure their arbitration agreements as they see fit, specify the governing rules, and specify *with whom* they choose to arbitrate their disputes. *Id.* at 1773-74 (quoting *Volt,* 489 U.S. at 479).

Accordingly, an arbitrator may not infer an implicit agreement to authorize class-action arbitration from the absence of an explicit agreement "to *preclude* class arbitration." *Id.* at 1775 (emphasis in original). "[T]he differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." *Id.* at 1776.[3]

If not reviewed and reversed, the Third Circuit's ruling provides a roadmap for nullifying or evading *Stolt-Nielsen*. For example, the court of appeals relied heavily on the "any dispute" language of the parties' agreement to support the arbitrator's finding of assent to class arbitration. But most arbitration agreements that are "silent" on class arbitration contain the same "any dispute" language present in the agreement here. *See, e.g., Stolt-Nielsen,* 130 S.Ct. at 1765; *Reed,* 681 F.3d at 642-43; *Jock,* 646 F.3d at 116. As the Fifth Circuit explained, reliance on the "any dispute" language of an arbitration agreement to find asset to class arbitration effectively nullifies *Stolt-Nielsen*. *Reed*, 681 F.3d at 643 (a "class arbitration award based upon an 'any dispute' clause would be insufficient under *Stolt–Nielsen* [because] a general arbitration clause, according to the *Stolt–Nielsen* Court, does not authorize class arbitration because class arbitration differs too much from individual arbitration") (quotation and citation omitted).

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[3] Consistent with that holding, the Court reiterated in *Concepcion* that imposing "manufactured" class arbitration on parties who had not agreed to it "interfere[d] with fundamental attributes of arbitration" and thus violated the FAA. *See* 131 S.Ct. 1748. Central to the Court's analysis is the recognition that "'changes brought about by the shift from bilateral arbitration to class-action arbitration' are 'fundamental,'" they "sacrifice[] the principal advantage of arbitration its informality and make[] the process slower, more costly, and more likely to generate procedural morass than final judgment. *Id.* at 1750, 1751 (quoting *Stolt-Nielsen,* 130 S. Ct. at 1776). Consequently, the Court once again concluded that class arbitration is "not arbitration as envisioned by the FAA" and therefore may not be required absent agreement of the parties. *Id.* at 1753.

Similarly, even where an agreement contains no provision whatsoever reflecting assent to class arbitration, a plaintiff will unilaterally have *carte blanche* to avoid *Stolt-Nielsen* simply by refusing to stipulate that there is "no agreement" on the subject. *Cf. Jock*, 646 F.3d at 129 n.2 (Winter, J., dissenting) ("Given my colleagues' narrow reading of the decision ... *Stolt-Nielsen* has been rendered an insignificant precedent in this circuit"). The experience of DRI members bears out this concern. Subsequent to *Stolt-Nielsen* there have been numerous instances of arbitrators and courts limiting this Court's holding to the context of a stipulated "no agreement" or conjuring up justifications for class arbitration in contracts that fall far short of affirmative "consent to resolve ... disputes in class proceedings." *Stolt-Nielsen*, 130 S.Ct. at 1776.

II. THE ISSUE PRESENTED IS IMPORTANT, RECURRING, AND PRIMED FOR REVIEW

A. The Third Circuit Decision Eliminates Vital Benefits of Arbitration

Arbitration is the "oldest known method of settlements of disputes." *McAmis v. Panhandle E.*

Pipeline Co., 273 S.W.2d 789, 794 (Mo. App. 1954). This Court has long favored arbitration as a means of dispute resolution. *See Burchell v. Marsh*, 58 U.S. 344, 349 (1854) ("As a mode of settling disputes, [arbitration] should receive every encouragement from courts of equity"). Congress confirmed the strong national policy in favor of arbitration by enacting the FAA. *See, e.g., CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 669 (2012) (citing several authorities); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983) ("Congress's clear intent, in the FAA, to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible").

It is well-recognized that "[b]y agreeing to arbitrate . . . a party . . . trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 628 (1985). The benefits of arbitration have been repeatedly recognized by this Court: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes. *See, e.g., Concepcion*, 131 S.Ct. at 1749; *Stolt-Nielsen*, 130 S.Ct. at 1775; *accord* Rice, *Enforceable or Not?: Class Action Waivers in Mandatory Arbitration Clauses and the Need for A Judicial Standard*, 45 Hou. L. Rev. 215, 246 (2008) ("Proponents of arbitration, and particularly of the mandatory arbitration clause, hail it as a boon to efficiency for our already-burdened judiciary as well as an economic advantage for both parties of a dispute").

Just as emphatically, however, the attributes of efficiency and simplicity do not exist in class arbitration, which by its nature is protracted, complex and public. *Cf.* Clancy & Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 Bus. Law. 55, 72 (2007) ("class arbitration is a proceeding of profoundly different substance and scope, in which many of millions of dollars and the company's future could be at stake"); Baker, *Class Action Arbitration*, 10 Cardozo J. of Conflict Resol. at 364 ("The fact that the procedural device of class treatment is not available in arbitration is part and parcel of arbitration's ability to offer simplicity, informality, and expedition characteristics that generally make arbitration an attractive vehicle for resolution of low-value claims").

Real-life experience with classwide arbitration bears out these concerns. As the AAA recited to this Court in its *Stolt-Nielsen amicus* brief, of the 283 class arbitrations AAA administered "in the nearly six years that the Class Rules have been in effect ... no class arbitration conducted under the Rules has resulted in a final award on the merits[.]" Brief of American Arbitration Association at 22-23, *Stolt-Nielsen v. AnimalFeeds Int'l Corp.*, No. 08-1198.

In that same *amicus* brief, AAA recounted statistics showing that the median and mean times for class arbitrations to traverse just the clause construction and class determination phases hovered around two years. *Id.* at 24; *accord Concepcion,* 131 S.Ct. at 1751 (citing statistics showing that class arbitration takes far longer than bilateral arbitration). And that was even before those cases reached any consideration of the merits. Specific cases, of course, can take much longer. As just one example, an arbitration that has been pending for more than four years has not progressed beyond the determination whether to proceed on a class-wide basis, and is still awaiting judicial consideration of the arbitrator's decision on that subject. *See Rivera, et al. v. Corinthian College, Inc., et al.*, No. 11 434 01075 08 (AAA claim filed May 28, 2008). Even if that case moves ahead, there will not be consideration of the merits until more than five years after the arbitration commenced.

Aside from the added expense of such lengthy disputes over the administrative form proceedings will take, class arbitrations pose an unacceptable potential for abuse. Some have suggested that an inherent conflict of interest lurks in a situation where arbitrators, who are paid by the hour, decide whether the proceedings over which they preside will be simple, efficient and inexpensive, or complex, protracted and costly.[4] *Cf. Com. Coatings Corp. v.*

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[4] *See, e.g.*, Clancy & Stein, *An Uninvited Guest*, 63 Bus. Law. at 73-74 (noting that arbitrators' rulings in class arbitration are "fraught with financial conflicts of interest" because "a decision to certify a class almost certainly would . . . increase the arbitrator's compensation for the case"); Deruelle & Roesch, *Gaming the Rigged Class Arbitration Game: How We Got Here and Where We Go Now – Part I*, The Metropolitan Corporate Counsel, August 2007, at p. 9, *available at* http://www. metrocorpcounsel.com/pdf/2007/August/09.pdf ("Simply put, arbitrators necessarily have a 'financial interest' in prolonging an arbitration, and especially a class arbitration, since the more time they devote to a case, the more money they will make"); Burch, *Necessity Never Made a Good Bargain: When Consumer Arbitration Agreements Prohibit Class Relief*, 31 Fla. St. U. L. Rev. 1005, 1031, 1034 (2004) ("Arbitrators may have a financial incentive to certify a class because the longer

Cont. Cas. Co., 393 U.S. 145, 150 (1968) (vacating an arbitration award and holding that "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias").

Further, even in the usual course, "the vast majority of certified class actions settle, most soon after certification." Bone & Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1291 (2002) ("[E]mpirical studies...confirm what most class action lawyers know to be true").[5] The same trend holds for class arbitration. *See* Baker, *Class Action Arbitration*, 10 Cardozo J. of Conflict Resol. at 353-54 (noting that as of August 2008, no class arbitration cases had reached a decision on the merits "there being a tendency for many cases to settle after the class arbitration award"). This is because class actions place defendants in the untenable position of betting the company on the outcome. Defendants face intense

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the arbitrator spends on the case the more money the arbitrator receives"); Carter, *High Court Says Let the Arbitrator Decide*, 2 No. 25 ABA J. E-Report 5 (June 27, 2003) (quoting chair of ABA Dispute Resolution Section's Arbitration Committee as saying "I think arbitrators will be inclined to find class action arbitration is appropriate because there is an economic incentive to do so"); *see also generally* Powell & Bales, *Ethical Problems in Class Arbitration*, 2011 J. Disp. Resol. 309, 320-29 (2011).

[5] *See also* Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L. Rev. 97, 99 (2009) ("With vanishingly rare exception, class certification [leads to] settlement, not full-fledged testing of the plaintiffs' case by trial."); Willging & Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591, 647 (2006) ("[A]lmost all certified class actions settle").

pressure to settle even if an adverse judgment seems "improbable." *See Thorogood v. Sears, Roebuck and Co.*, 547 F.3d 742, 745 (7th Cir. 2008); *accord Rhone-Poulenc,* 51 F.3d at 1298.

Indeed, this Court has noted the "risk of 'in terrorem' settlements that class actions entail" because when "[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *Concepcion,* 131 S. Ct. at 1752 (citing *Kohen v. Pac. Inv. Mgmt. Co. LLC,* 571 F.3d 672, 677-78 (7th Cir. 2009)). As Judge Posner has explained:

> When the potential liability created by a lawsuit is very great, even though the probability that the plaintiff will succeed in establishing liability is slight, the defendant will be under pressure to settle rather than to bet the company, even if the betting odds are good. [The defendant] has good reason not to want to be hit with a multi-hundred-million-dollar claim that will embroil it in protracted and costly litigation—the class has more than a thousand members, and determining the value of their claims, were liability established, might thus require more than a thousand separate hearings.

Kohen, 571 F.3d at 677-78.[6] Fear of negative publicity is also a motivating factor to settle even weak class claims. Chamblee, *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 La. L. Rev. 157, 222 (2004).

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[6] *See also Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 168 (3d Cir. 2001) ("granting [class] certification may generate unwarranted pressure to settle nonmeritorious or marginal claims"); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("Class certification

The strain this places on the individuals and businesses DRI's members represent is extreme. The attendant costs of a major lawsuit amplified by the complex vagaries of class action treatment could sound the death knell for new or financially fragile companies. Bondi, *Facilitating Economic Recovery and Sustainable Growth Through Reform of the Securities Class-Action System: Exploring Arbitration as an Alternative to Litigation*, 33 Harv. J.L. & Pub. Pol'y 607, 612 (2010). The ripple effects of exorbitant settlements are felt throughout the economy and are particularly invidious when the enormity of potential classwide recovery masks a substantively non-meritorious case *See, e.g.*, Bohn & Choi, *Fraud in the New-Issues Market: Empirical Evidence on Securities Class Actions*, 144 U. Pa. L. Rev. 903, 970 (1996) (Describing "strike suits" designed to obtain "the defendants' cost savings from avoiding the litigation, distraction, and reputation costs of responding to the plaintiffs' complaint" rather than the true worth of the claim). The court of appeals' holding in this case, if left uncorrected by this Court, will exacerbate these problems and engender "blackmail settlements." *Rhone-Poulenc*, 51 F.3d at 1298 (citing Friendly, *Federal Jurisdiction: A General View* 120 (1973)).

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magnifies and strengthens the number of unmeritorious claims[. This] creates insurmountable pressure on defendants to settle.... The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low") (citations omitted).

B. Class Arbitration Lacks Many Procedural Safeguards Present in Ordinary Litigation

All of the adverse practical ramifications of the Third Circuit decision are magnified further by the lack of procedural safeguards of class arbitration. Given the "in terrorem" effects of blackmail settlements, this Court was exactly correct in finding it "hard to believe that defendants would bet the company with no effective means of review." *Concepcion,* 131 S. Ct. at 1752. *See Stolt-Nielsen,* 130 S.Ct. at 1775-76 ("In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes. But the relative benefits of a class-action arbitration are much less assured, giving reason to doubt the parties' mutual consent to resolve disputes through classwide arbitration").

The opportunities for judicial and appellate review are narrowly circumscribed in the arbitration context. The FAA provides that a court may vacate an arbitrator's substantive award of relief on the merits only in the event of fraud, corruption, bias, misconduct or misbehavior by the arbitrators, or where the arbitrators exceeded their powers or failed to make a "final and definite" award. *See* 9 U.S.C. §10(a). Courts' powers to modify such an arbitration award are limited to cases involving material miscalculations or mistakes, errors in form, and rulings on issues not before the arbitrator. *See id.* §11. These grounds for review may not be expanded by agreement of the parties. *Hall Street Assoc's v.*

Mattel, Inc., 128 S.Ct. 1396 (2008). Such limitations on judicial review raise serious questions of fairness for all parties to class arbitration. *Cf.* Clancy & Stein, *An Uninvited Guest*, 63 Bus. Law. at 71 ("[f]irst and foremost, a decision by the arbitrator with respect to class certification and an ultimate award are virtually non-appealable"; quotation omitted).

It is not only the lack of searching judicial review that makes class arbitration inherently perilous for defendants. Arbitration also lacks many salutary procedural mechanisms readily available in litigation, such as motions to dismiss and motions for summary judgment. *See* Fed. R. Civ. P. 12(b)(6) & 56. These procedures can end meritless and frivolous litigation before discovery or trial. But in arbitration, defendants lack the right to be heard on a motion to dismiss. Dispositive motions in arbitration are not encouraged and are rarely granted.[7] Indeed, "[s]ummary judgment in AAA arbitration is so rare as to be statistically insignificant." Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L. Rev. 105, 113 (2003). Absent such basic procedural mechanisms to end meritless class claims at a pre-trial stage, defendants may force even greater pressure to settle class arbitration than class action litigation. Where the parties never expressly agreed to class arbitration in the first place, there is no supportable basis for unleashing such coercive pressure.

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[7] *See, e.g.*, Sherwyn, *Because it Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 1 Berkeley J. Emp. & Lab. L. 1, 27 & n. 122 (2003); Steinberg, *A Decade After McMahon: Securities Arbitration: Better for Investors Than the Courts?*, 62 Brooklyn L. Rev. 1503, 1513-14 & n. 56 (1996).

Equally as important, a highly valued attribute of single party v. single party arbitration is the desire to preserve confidentiality. That benefit, too, is lost in class arbitration since such proceedings result in publicly available awards. Typically, arbitration awards are confidential (*see* AAA Supplementary Rule 9(a)) and arbitrators are generally discouraged from writing opinions explaining the rationale for their awards. *See, e.g., United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960); DOMKE ON COMMERCIAL ARBITRATION §29:06 (G. White rev. ed. 1984). But class arbitration is antithetical to confidentiality, and in AAA class arbitrations the parties can expect their demands and all rulings will be publicly posted on the Internet. *See generally* AAA Searchable Class Arbitration Docket, *available at* http://www.adr.org/sp.asp?id=25562. That aspect of class arbitration poses a particular dilemma for defendants whose records and dealings with absent class members are subject to the strictures of privacy law – most especially, for example, educational institutions, medical and health related businesses, and employers.

Finally, vital due process guarantees present in litigation are non-existent in class arbitration. Because arbitration agreements are binding only on parties, any potential class members who have no arbitration agreements, or whose agreements do not cover the dispute at issue, should be unaffected by the arbitrator's final award. In *Moses H. Cone*, this Court held that where a party has related disputes with two different parties – one with an arbitration agreement and one without – each case must proceed in a separate forum:

> [T]he relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement. Under the [FAA], an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement.

460 U.S. at 20 (emphasis in original; footnote omitted). It is well-settled, moreover, that a contract cannot bind a non-party. *See, e.g., EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

As a result, in class arbitration, if an arbitrator has issued an award in favor of the plaintiff class, the defendant(s) could still face additional litigation – even class litigation – by purported class members. Most directly, this threat exists for absent class members not subject to an arbitration agreement; but the threat exists as well for absent class members with arbitration agreements who did not receive the full panoply of due process notice and procedural regularity that must precede judgments in class action litigation. Although this burden may reasonably be imposed on defendants whose contracts expressly permit class arbitration, it is an unreasonable burden for those whose contracts do not.

C. Review is Warranted Now

The real-life experience of how arbitrators have misapplied this Court's precedents has subjected defendants to complex, high-stakes, class arbitration procedures to which they never agreed. That result is incompatible with the principle that contractual agreement is the cornerstone on which the entire arbitration system rests. Even worse, defendants coerced into class arbitration are deprived of substantial rights, including the benefits of finality and repose even if they prevail on the merits. That result is incompatible with the principal justifications for permitting class action litigation in the courts in the first place, *viz.*, class-wide finality and repose. Under such a regime, with "millions of dollars and perhaps the company's future...at risk," and absent "the safeguards litigation provides[,] the consequences of an unreviewable arbitral error are so great that arbitration is no longer a viable option." Clancy & Stein, *An Uninvited Guest*, 63 Bus. Law. at 71, 73-74 (citations omitted). The experience of DRI members confirms that these risks are real.

Further guidance from this Court continues to be needed because, as a practical matter, parties cannot revisit and revise all their contracts containing arbitration agreements whenever another conflicting decision comes along imposing new and different standards for saying no to class arbitration. In the real world in which DRI's members function, arbitrators often see – and will continue to see – contracts drafted long before anyone could reasonably have considered class arbitration a subject for negotiation. For example, the form of contract at issue in *Stolt-Nielsen* was developed more than 50 years earlier. *See Stolt-Nielsen*, 130 S.Ct. at 1765.

And even if it were remotely feasible to expect that every contract be revised to insert whatever new magic words a court requires to preclude class arbitration, there is no certainty that such clauses will be enforced by the next court. The existing circuit conflict and even greater disarray in the district courts and among arbitrators establish this point. Further examples are provided by the decision of the California Supreme Court that this Court reversed in *Concepcion*, and the series of decisions by the Second Circuit in *In re Am. Express Merchants' Litig.*, 667 F.3d 204 (2d Cir.) (refusing to enforce arbitration agreement's ban on class actions ostensibly because it would prevent many plaintiffs from obtaining effective relief), *pet. for rehearing en banc denied,* 681 F.3d 139 (2d Cir.), *pet. for cert. filed,* No. 12-133 (July 30, 2012).[8]

The existing practical problems created by this issue are painfully acute for the nation's employers since expressly forbidding class arbitrations may result in an unfair labor charge from the National Labor Relations Board ("NLRB"). Earlier this year, the NLRB held that requiring all employment-related disputes to be resolved through individual arbitration (and disallowing class claims) violated the National Labor Relations Act ("NLRA") because it prohibited the exercise of substantive rights protected by section 7 of the NLRA. *See In re D.R. Horton, Inc.,* 357 NLRB No. 184, 2012 WL 36274 (2012). Although no court of appeals has yet spoken on the matter, district courts are already deeply divided on whether *D.R. Horton* is consistent with this Court's precedents.[9]

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[8] DRI is filing an *amicus curiae* brief in No. 12-133 urging that the Court grant the *American Express* petition for certiorari. Each case – *American Express* and this one – independently warrants certiorari. Since both are pending at the same time, the Court has an ideal opportunity to resolve pressing questions concerning the availability of class arbitration in a broad context that will greatly benefit millions of businesses and individuals. Accordingly, DRI submits that both petitions should be granted.

Hence, unless this Court grants certiorari and clarifies the law, employers who enter arbitration agreements with their employees will continue to face an untenable clash of conflicting standards. Under the court of appeals decision here (and *Jock)*, an employer risks class arbitration if it does not expressly disclaim the availability of class-based relief. But under *D.R. Horton*, if the employer includes an express waiver of class actions in arbitration agreements, it could be committing an unfair labor practice in the eyes of the NLRB.

Based on the extensive experience of its members, DRI submits that the intensely practical points discussed in this *amicus* brief weigh heavily in favor of certiorari. At the end of the day, this case is an ideal vehicle for resolving a persistent circuit conflict on an important issue of federal law. This Court's review is fully warranted.

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[9] *Compare Delock v. Securitas Sec. Servs. USA, Inc.*, – F.Supp.2d –, 2012 WL 3150391, at **4-5 (E.D. Ark. 2012); *Morvant v. P.F. Chang's China Bistro, Inc.*, 2012 WL 1604851, at *9 (N.D. Cal. May 7, 2012); *Jasso v. Money Mart Express, Inc.*, – F. Supp.2d –, 2012 WL 1309171 at **7-10 (N.D. Cal. Apr. 13, 2012). *Palmer v. Convergys Corp.*, 2012 WL 425256, at *3 (M.D. Ga. Feb. 9, 2012); *and LaVoice v. UBS Fin. Servs., Inc.*, 2012 WL 124590, at *6 (S.D.N.Y. Jan. 13, 2012) (all rejecting *D.R. Horton*); *with Herrington v. Waterstone Mortg. Corp.*, 2012 WL 1242318 (W.D. Wis. Mar. 16, 2012); *and Owen v. Bristol Care, Inc.*, 2012 WL 1192005 (W.D. Mo. Feb. 28, 2012) (following *D.R. Horton*).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 29, 2012

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JOINT APPENDIX

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
JAN 22 2013
OFFICE OF THE CLERK

No. 12-135

IN THE

Supreme Court of the United States

OXFORD HEALTH PLANS LLC,
Petitioner,

v.

JOHN IVAN SUTTER, M.D.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 27, 2012
CERTIORARI GRANTED DECEMBER 7, 2012

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U.S. DISTRICT COURT
DISTRICT OF NEW JERSEY (NEWARK)

CIVIL DOCKET FOR CASE #:
2:05-cv-02198-GEB-MCA

SUTTER v. OXFORD HEALTH PLANS LLC[1]

04/25/2005	1	OXFORD'S NOTICE OF MOTION to Vacate Arbitration Award Certifying a "Class Arbitration" by OXFORD HEALTH PLANS LLC., with Attachments *** (Entered: 05/02/2005)
04/25/2005	2	OXFORD'S NOTICE OF MOTION For Stay Pending Appeal. ***, with Attachment *** (Entered: 05/02/2005)

* * *

05/09/2005	5	BRIEF in Opposition to Oxford's Motions to Vacate and Stay, and in Support of Cross-Motion to Dismiss filed by JOHN IVAN SUTTER, with Attachments*** (Entered: 05/09/2005)

* * *

05/31/2005	11	REPLY to Response to Motion re MOTION to Vacate filed by OXFORD HEALTH PLANS LLC (Entered: 05/31/2005)
05/31/2005	12	REPLY to Response to MOTION to Stay and MOTION to Vacate filed by OXFORD HEALTH PLANS LLC., with Attachments *** (Entered: 05/31/2005)

---

[1] Entries edited for clarity.

* * *

06/01/2005	14	BRIEF in Opposition to Cross-Motion to Dismiss for Lack of Subject Matter Jurisdiction filed by OXFORD HEALTH PLANS LLC, with Attachments *** (Entered: 06/01/2005)
06/15/2005	15	NOTICE by OXFORD HEALTH PLANS LLC of Motion to Transfer filed with the Judicial Panel on Multidistrict Litigation (MDL Docket No. 1334), with Attachments*** (Entered: 06/15/2005)

* * *

07/25/2005	17	RESPONSE to Motion re MOTION to Stay re MOTION to Vacate filed by JOHN IVAN SUTTER, with Attachments *** (Entered: 07/25/2005)
08/01/2005	18	BRIEF in Reply on Motion To Transfer filed by OXFORD HEALTH PLANS LLC, with Attachments *** (Entered: 08/01/2005)

* * *

10/26/2005	19	MDL ORDER denying transfer of this action to Southern District of Florida *** (Entered: 10/27/2005)
10/31/2005	20	ORDER denying Motion to Stay, denying Motion to Vacate arbitration award and denying motion to dismiss. Signed by Judge Joseph A. Greenaway, Jr. on 10/28/05 (Entered: 10/31/2005)

10/31/2005	21	OPINION (Copy to NJLJ). Signed by Judge Joseph A. Greenaway, Jr. on 10/28/05 (Entered: 10/31/2005)
11/02/2005	N/A	Civil Case Terminated (Entered: 11/02/2005)
11/28/2005	22	NOTICE OF APPEAL as to Order on Motion to Stay, Order on Motion to Vacate by OXFORD HEALTH PLANS LLC. *** (Entered: 11/28/2005)

* * *

02/28/2007	25	USCA JUDGMENT as to Notice of Appeal (USCA) filed by OXFORD HEALTH PLANS LLC. Affirming the decision of the District Court. (Entered: 02/28/2007)
03/22/2007	26	MANDATE of USCA as to Notice of Appeal (USCA), filed by OXFORD HEALTH PLANS LLC, with Attachments *** (Entered: 03/22/2007)
08/13/2010	27	MOTION to Reopen Case by OXFORD HEALTH PLANS LLC., with Attachments *** (Entered: 08/13/2010)

* * *

08/13/2010	31	MOTION to Vacate and Supporting Documents by OXFORD HEALTH PLANS LLC, with Attachments *** (Entered: 08/13/2010)
08/13/2010	32	DECLARATION re MOTION to Vacate and Supporting Documents by OXFORD HEALTH PLANS LLC, with Attachments *** (Entered: 08/13/2010)

* * *

09/07/2010 N/A ORDER granting Motion to Reopen Case and that Oxford's motion to vacate shall be returnable on 10/18/2010. Signed by Chief Judge Garrett E. Brown, Jr. on 9/7/2010 (Entered: 09/07/2010)

* * *

09/24/2010 38 MOTION to Dismiss for Lack of Subject Matter Jurisdiction Pursuant to F.R.C.P. 12(b)(1) by JOHN IVAN SUTTER, with Attachments *** (Entered: 09/24/2010)

* * *

10/04/2010 42 NOTICE by JOHN IVAN SUTTER re MOTION to Vacate and Supporting Documents, Declaration, Notice of Cross-Motion to Confirm Arbitrator's Procedural Order No. 18, with Attachments *** (Entered: 10/04/2010)

* * *

10/18/2010 44 BRIEF in Opposition re MOTION to Dismiss for Lack of Subject Matter Jurisdiction Pursuant to F.R.C.P. 12(b)(1) filed by OXFORD HEALTH PLANS LLC, with Attachments *** (Entered: 10/18/2010)

10/18/2010 45 DECLARATION re Brief in Opposition to Motion, by OXFORD HEALTH PLANS LLC, with Attachments *** (Entered: 10/18/2010)

* * *

10/25/2010	48	REPLY BRIEF to Opposition re MOTION to Dismiss for Lack of Jurisdiction Subject Matter Jurisdiction Pursuant to F.R.C.P. 12(b)(1) filed by JOHN IVAN SUTTER, with Attachments *** (Entered: 10/25/2010)

* * *

10/25/2010	50	REPLY BRIEF to Opposition re MOTION to Vacate and Supporting Documents filed by OXFORD HEALTH PLANS LLC (Entered: 10/25/2010)
10/25/2010	51	DECLARATION re Reply Brief to Opposition to Motion by OXFORD HEALTH PLANS LLC, with Attachments *** (Entered: 10/25/2010)
11/11/2010	52	Letter from Adam Saravay, with Attachments *** (Entered: 11/11/2010)
11/11/2010	53	Letter from Eric D. Katz to Honorable Garrett E. Brown, Jr., U.S.D.J. re Letter (Entered: 11/11/2010)
11/12/2010	54	LETTER ORDER granting counsel's request; Pltf may file a sur-reply not to exceed five pages within 10 days of the date of this Order. Signed by Chief Judge Garrett E. Brown, Jr on 11/12/2010. (Entered: 11/15/2010)
11/16/2010	55	Letter from Eric D. Katz to Honorable Garrett E. Brown, Jr., U.S.D.J. in response to Oxford's sur-reply and in further support of Dr. Sutter's Rule 12(b)(1) motion to dismiss Oxford's vacatur motion for lack of subject matter jurisdiction ***. (Entered: 11/16/2010)

02/22/2011	56	MEMORANDUM OPINION. Signed by Chief Judge Garrett E. Brown, Jr on 2/22/2011. (Entered: 02/22/2011)
02/22/2011	57	ORDER denying Oxford's Motion to Vacate arbitration award and/or for reconsideration; granting Sutter's Cross-Motion to confirm arbitration award; denying Sutter's Motion to Dismiss for Lack of Jurisdiction; closing case. Signed by Chief Judge Garrett E. Brown, Jr on 2/22/2011. (Entered: 02/22/2011)
02/22/2011	N/A	Civil Case Terminated. (Entered: 02/22/2011)
02/25/2011	58	AMENDED MEMORANDUM OPINION. Signed by Chief Judge Garrett E. Brown, Jr on 2/22/2011. (Entered: 02/25/2011)
03/23/2011	59	NOTICE OF APPEAL by OXFORD HEALTH PLANS LLC. *** (Entered: 03/23/2011)

* * *

04/03/2012	61	USCA JUDGMENT as to Notice of Appeal (USCA), filed by OXFORD HEALTH PLANS LLC affirming Order of the District Court entered on February 22, 2011. Mandate to follow. (Entered: 04/03/2012)
05/08/2012	62	MANDATE of USCA as to Notice of Appeal (USCA), filed by OXFORD HEALTH PLANS LLC, with Attachments *** (Entered: 05/08/2012)

* * *

THIRD CIRCUIT COURT OF APPEALS
# 11-1773

JOHN SUTTER v. OXFORD HEALTH PLANS

APPEAL FROM: UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY[1]

03/25/2011 CIVIL CASE DOCKETED. Notice filed by Appellant Oxford Health Plans in District Court No. 2-05-cv-02198. (MB)

* * *

05/23/2011 ELECTRONIC BRIEF on behalf of Appellant Oxford Health Plans LLC, filed. Certificate of Service dated 05/23/2011 by ECF.

05/23/2011 ELECTRONIC JOINT APPENDIX on behalf of Appellant Oxford Health Plans LLC, filed. Certificate of service dated 05/23/2011 by ECF.

06/22/2011 ELECTRONIC BRIEF on behalf of Appellee John Ivan Sutter, filed. Certificate of Service dated 06/22/2011.

07/06/2011 ELECTRONIC REPLY BRIEF on behalf of Appellant Oxford Health Plans LLC, filed. Certificate of Service dated 07/06/2011 by ECF.

09/21/2011 Calendared for Thursday, 11/17/2011 in Newark, NJ.

* * *

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[1] Entries edited for clarity.

11/17/2011	Argued on Thursday, November 17, 2011 before FUENTES, CHAGARES, Circuit Judges and *POGUE, Chief International Trade Judge. P. Christine Deruelle arguing for Appellant Oxford Health Plans LLC; Eric D. Katz arguing for Appellee John Ivan Sutter. *(Hon. Donald C. Pogue, Chief International Trade Judge of the United States Court of International Trade sitting by designation.)
04/03/2012	PRECEDENTIAL OPINION Coram: FUENTES, CHAGARES, Circuit Judges and *POGUE, Judge. Total Pages: 20. Judge: FUENTES Authoring. *Hon. Donald C. Pogue, Chief Judge, United States Court of International Trade, sitting by designation.
04/03/2012	JUDGMENT, Affirmed. The parties shall bear their own costs.

* * *

04/04/2012	ORDER AMENDING OPINION (Coram: FUENTES, CHAGARES, Circuit Judges and *POGUE, Judge) amending opinion at direction of the court as follows: first paragraph, first line of the opinion filed April 3, 2012 omitted the first name of the appellee, it is hereby ordered that the opinion is amended as follows: Oxford Health Plans, LLC and Dr. John Ivan Sutter are parties to a Primary Care Physician Agreement, drafted by Oxford, which contains a broad arbitration clause. *Hon. Donald C. Pogue, Chief Judge, United States Court of International Trade, sitting by designation.

04/17/2012	Petition filed by Appellant Oxford Health Plans LLC for Rehearing before original panel and the court en banc. Certificate of Service dated 04/17/2012.
04/30/2012	ORDER (MCKEE, Chief Judge, SLOVITER, SCIRICA, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, and VANASKIE, Circuit Judges and POGUE, JUDGE) denying Rehearing En Banc Rehearing filed by Appellant Oxford Health Plans LLC; denying Rehearing for Panel Rehearing filed by Appellant Oxford Health Plans LLC, filed. Julio M. Fuentes, Authoring Judge.
05/08/2012	MANDATE ISSUED, filed.
08/02/2012	NOTICE from U.S. Supreme Court. Petition for Writ of Certiorari filed by Oxford Health Plans LLC on 07/27/2012 and placed on the Supreme Court docket on July 31, 2012. Supreme Court Case No. 12-135.
12/10/2012	NOTICE of U.S. Supreme Court disposition, No. 12-135. The motion of the Chamber of Commerce of the United States of America for leave to file a brief as amicus curiae is granted. The motion of DRI- The Voice of Defense Bar for leave to file a brief as amicus curiae is granted. The Petition for Writ of Ceriorari filed by Oxford Health Plans LLC granted on 12/10/2012 [sic].

OXFORD HEALTH PLANS (NJ), INC.
PRIMARY CARE PHYSICIAN AGREEMENT
SIGNATURE PAGE

IN WITNESS WHEREOF, Primary Care Physician and Oxford Health Plans (NJ), Inc. have executed this PRIMARY CARE PHYSICIAN AGREEMENT as set forth below. This PRIMARY CARE PHYSICIAN AGREEMENT shall be effective on the date it is signed by both parties hereto contingent only upon Primary Care Physician being successfully credentialed by Oxford.

Line of Business	For Oxford Use Only	
Primary Care Physician elects to participate in Oxford's Commercial managed care plans, as shown below.		
☒ Commercial/ Freedom Network at the rates shown in Attachment A-1.	☐ Yes	☐ No
☒ Commercial/ Liberty Network at the rates shown in Attachment A-2.	☐ Yes	☐ No
☐ Primary Care Physician elects to participate in Oxford's Medicare program at the rates shown in Attachment A-3.	☐ Yes	☐ No

PRIMARY CARE PHYSICIAN
Signed: /s/ John Ivan Sutter
Print Name: John Ivan Sutter
Date: 9/14/98

OXFORD HEALTH PLANS (NJ), INC.
Signed: /s/ Judith A. Norman
Print Name: Judy Roman
Title: Regional Vice President
Medical Delivery Systems
Date: 9/30/98

For administrative ease and efficiency, Oxford has placed the Signature Page of this PRIMARY CARE PHYSICIAN AGREEMENT at the front rather than at the back page of this document.

OXFORD HEALTH PLANS (NJ), INC.

PRIMARY CARE PHYSICIAN AGREEMENT

This agreement ("Agreement") sets forth the terms whereby Primary Care Physician will treat members of Oxford's medical plans ("Members").

1. Health Services. Primary Care Physician agrees to provide to Oxford Members("Members") who select Primary Care Physician all medically necessary primary care health services which Members are entitled to receive under their Oxford Certificate of Coverage or Member Handbook ("Covered Services"), which Primary Care Physician is qualified to provide. Primary Care Physician shall have the primary responsibility for providing and coordinating the overall health care of each of his/her Members, including appropriate referrals to Consultant Physicians, Hospitals and other providers in Oxford's network. Primary Care Physician agrees to comply with all Oxford's credentializing/recredentializing, administrative, patient referral, utilization review, quality assurance and reimbursement procedures as may be adopted by Oxford from time to time. Primary Care Physician shall make arrangements to assure the availability of coverage for physician services to his/her Members on 24 hours per day, 7 days per week basis. Primary Care Physician agrees not to differentiate or discriminate in the treatment of his/her patients on the basis of race, sex, age, religion, place of residence health status or source of payment, including Medicare and Medicaid, and to observe, protect and promote the rights of Members as patients.

2. Reimbursement Rates. Oxford shall pay Primary Care Physician Approved Charges for medically

necessary Covered Services provided to Members, as set forth in Attachment A hereto. Oxford and Primary Care Physician agree that the purpose of the compensation arrangement is to control the cost of health services, including hospitalization, and to ensure the appropriate level of utilization while maintaining quality of care.

3. Payment/Hold Harmless. Primary Care Physician shall bill Oxford for reimbursement. Billings shall be in form and detail acceptable to Oxford. Primary Care Physician's compensation from Oxford for the medically necessary Covered Services provided to Members, shall be as set forth in Attachment A hereto. Primary Care Physician agrees to seek payment for Covered Services only from Oxford and in no event, including but not limited to nonpayment by Oxford, insolvency of Oxford or breach of this Agreement, shall Primary Care Physician bill, charge, collect a deposit from, seek compensation, remuneration or reimbursement from, or have any recourse against a Member, a Member's family or persons (other than Oxford) acting on his/her behalf for services provided pursuant to this Agreement. This provision does not prohibit Primary Care Physician from collecting applicable deductibles in point-of-service plans, copayments or fees for uncovered services delivered on a fee-for-service basis to Members. Oxford shall make payment in full to Primary Care Physician for "clean" claims within 60 days of receipt by Oxford.

4. Referrals. Except in cases of a true medical emergency, Primary Care Physician shall only refer Members to Consultant Physicians, Hospitals and other providers in Oxford's network in accordance with Oxford referral procedures. Primary Care Physician must

notify Oxford at least 14 days in advance of elective hospitalizations of Members.

5. Medical Records. Primary Care Physician and Oxford agree that all Members' medical records shall be treated as confidential so as to comply with all state and federal laws regarding the confidentiality of patient records. To the extent permitted by law, Oxford shall have the right to inspect at all reasonable times any accounting, administrative or medical records maintained by Primary Care Physician pertaining to Oxford, to Members or to Primary Care Physician's participation hereunder. In addition, Primary Care Physician agrees that he/she shall provide access to all medical records of Members to appropriate personnel including furnishing copies of such records in a timely basis (within 10 days of Oxford's request), and to appropriate personnel of the State Departments of Health and Senior Services, and/or Insurance and Banking in compliance with all applicable statutes and regulations.

6. Quality Assistance and Utilization Review. Primary Care Physician agrees to cooperate with and to participate in such peer review programs, including utilization review and quality assurance programs, precertification, external audit systems, and administrative and grievance procedures, and all other policies as are established by Oxford. Primary Care Physician agrees to comply with all final determination rendered by Oxford's quality assurance programs, peer review programs or grievance procedures. Primary Care Physician agrees that all services performed for Members shall be consistent with the proper practice of medicine, and that such services shall be performed in accordance with the customary rules of ethics and conduct of the American Medical Association and such other bodies, formal or informal, governmental or otherwise, from

which physicians seek advice and guidance or to which they are subject to licensing and control. Primary Care Physician shall immediately notify Oxford if any medical license, board certification or hospital admitting privileges applicable to Primary Care Physician is ever revoked or restricted in any manner.

7. Admitting Privileges/Board Certification/Controlled Substance Certification. Primary Care Physician shall obtain as soon as possible and maintain at all times admitting privileges at one or more Hospital's in Oxford's network. Primary Care Physician shall be Board Certified or have within the last five years become Board Eligible in his/her specialty or a functionally equivalent status acceptable to Oxford and shall maintain at all times his/her licensure and controlled substance certification with the Drug Enforcement Administration in compliance with all applicable statutes and regulations.

8. Insurance. Primary Care Physician shall provide and maintain such policies of general and professional liability (malpractice) insurance as shall be necessary to insure Primary Care Physician and his/her employees against any claim or claims for damages arising by reason of personal injuries or death occasioned, directly or indirectly, in connection with the performance of any service by Primary Care Physician. The amount and extent of such insurance coverage shall be subject to the approval of Oxford; and shall not be less than $1,000,000 per claim and $3,000,000 per year.

9. Interpretation. This Agreement shall be governed in all respects by New Jersey law. Oxford may modify any provision of this Agreement upon written notice to Primary Care Physician. Oxford may assign

this Agreement, in whole or in part, without notice. The invalidity or unenforceability of any term or condition of this Agreement shall not affect the validity or enforceability of any other term or provision. The waiver by either party of a breach or violation of any provision of this Agreement shall not operate as or be construed to be a waiver of any subsequent breach hereof. All material changes to this agreement must receive prior approval from the New Jersey Departments of Health and Senior Services and Banking and Insurance, and, with regard to the Hold Harmless and the Post-Termination provisions, must receive the additional prior approval of the Health Care Financing Administration.

10. Relationship of Parties. No provision of this Agreement is intended to create nor shall be deemed or construed to create any relationship between the parties hereto other than that of independent entities contracting with each other hereunder solely for the purpose of effecting the provisions of this Agreement. Neither of the parties hereto, nor any of their respective employees, shall be construed to be the agent, employee or representative of the other, nor does either party have an express or implied right or authority to assume or create any obligation or responsibility on behalf of or in the name of the other party. Neither Primary Care Physician nor Oxford shall be liable to any other party for any act, or any failure to act, of the other party to this Agreement. Notwithstanding the foregoing, Primary Care Physician shall have the authority by this Agreement to render medical services to Members on behalf of Oxford.

11. Arbitration. No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be sub-

mitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association with one arbitrator. All costs and expenses of the arbitration, including actual attorney's fees, shall be allocated among the parties to this Agreement according to the arbitrator's discretion. The arbitrator's award may be confirmed and entered as a final judgment in any court of competent jurisdiction and enforced accordingly. Proceeding to arbitration and obtaining an award thereunder shall be a condition precedent to the bringing or maintaining of any action in any court with respect to any dispute arising under this Agreement, except for the institution of a civil action to maintain the status quo during the pendency of any arbitration proceeding.

12. Term and Termination. The initial term of this Agreement shall be for one year, commencing on the date it is countersigned by Oxford. The term of this Agreement shall be automatically renewed from year-to-year thereafter. This Agreement may be terminated by Oxford or Primary Care Physician at any time, upon 90 days prior written notice to other party. If the reason for termination is not the expiration of an non-renewal of this Agreement, Primary Care Physician's breach of any provision of this Agreement, there is a determination of fraud by Primary Care Physician, or, in the opinion of the Regional Medical Director, the Primary Care Physician represents and imminent danger to a Member, upon Primary Care Physician's request, Oxford will furnish Primary Care Physician with the reason for termination and a notice of a right to a hearing within 30 days of such request. This Agreement may also be terminated by Oxford effective immediately if any of Primary Care Physician's medical license, board certification or hospital admitting privi-

leges is revoked or restricted. Additionally, either party may terminate this Agreement effective immediately by written notice upon a material default by the other of its duties and obligations hereunder, including without limitation a refusal or other failure by the Primary Care Physician to arrange for the provision of Covered Services to Members in accordance with the applicable policies and procedures of Oxford, which material default continues for 15 days following written notice to the other of such default. Notwithstanding the above, Primary Care Physician may not be terminated or penalized solely because of filing a complaint or appeal as permitted by New Jersey law and regulations.

13. Post-Termination Obligations. Upon termination, by either party, the rights of each party hereunder shall terminate, provided however, that such termination shall not release Primary Care Physician or Oxford of their obligations with respect to: payments accrued to Primary Care Physician prior to termination; Primary Care Physician's agreement to hold Members harmless and to not seek compensation from Members, a Member's family or persons acting on their behalf for Covered Services provided prior to termination. Primary Care Physician further agrees that in the event of Oxford's insolvency or other cessation of operations, completion of treatment of Members then receiving care from Primary Care Physician until continuation of the Members' care can be arranged by Oxford or up to 120 calendar days in cases where it is deemed medically necessary for the Member to continue treatment with Primary Care Physician. In cases of pregnancy, medical necessity is deemed demonstrated and coverage of services by Primary Care Physician shall continue to the postpartum evaluation of Member, up to six weeks

after delivery. The determination of medical necessity of a Member's continued treatment with a Primary Care Physician shall be subject to the appeal procedure pursuant to N.J.A.C. 8.38–8.5 through 8.7. Primary Care Physician further agrees that in the event of Oxford's insolvency or other cessation of operations, benefits to Members will continue through the period for which premium has been paid, and benefits to Members confined in an inpatient facility on the date of insolvency or other cessation of operations will continue until their discharge. Primary Care Physician agrees that the provisions of this paragraph and the Hold Harmless provisions of Paragraph 3 shall survive the termination of this Agreement regardless of the reason for termination, including insolvency of Oxford, and shall be construed to be the benefit of Members. Primary Care Physician also agrees that the aforementioned provisions supersede any oral or written contrary agreement now existing or hereafter entered into between himself/herself and Members or persons acting on their behalf insofar as such contrary agreement relates to liability for payment for, or continuation of Covered Services provided under the terms and conditions of this Agreement.

14. Defined Terms. The term "Oxford" as used herein shall mean Oxford Health Plans (NJ), Inc. or any affiliate or subsidiary of Oxford Health Plans, Inc., including but not limited to Oxford Health Insurance Inc., which offers, administers or provides health services. The term "Member" shall mean any individual who has entered into, or for whom an employer or other entity has entered into on his/her behalf, a contractual relationship with Oxford to receive "Covered Services." "Covered Services" shall mean health care services and supplies within the scope of a Member's plan of bene-

fits, subject, in some cases, to precertification and other medical management protocols. "Approved Charges" are the amounts due to Primary Care Physician from Oxford for the provision of covered Services which have been delivered in compliance with all required precertifications and medical management protocols.

15. Non-Exclusivity. This Agreement with Primary Care Physician is non-exclusive for either party, and does not in any way restrict Primary Care Physician from entering into agreements with other health care organizations.

16. Advance Directives. Primary Care Physician understands and agrees that Members have the right to accept or refuse treatment and execute advance directives. Primary Care Physician shall (i) document in Member's medical record whether or not the Member has executed an advance directive and, if so, keep a copy of the directive; and (ii) not condition the provision of care or otherwise discriminate against Member based on whether or not Member has executed an advance directive.

17. Primary Care Physician Licensure. Under no circumstances shall this Agreement impose obligations or responsibilities upon Primary Care Physician which require Primary Care Physician to violate the statues or regulations governing licensure of Primary Care Physician if Primary Care Physician is to comply with the terms of this Agreement.

18. Communication with Members. Oxford encourages Primary Care Physician to freely communicate with Members regarding appropriate treatment alternatives, regardless of benefits limitations; Oxford shall not penalize Primary Care Physicians for discussing medically necessary or appropriate care with Mem-

bers or for being an advocate for medical care on behalf of a Member.

19. Confidentiality. Primary Care Physician shall maintain such records (medical and non-medical) and provide such medical, financial and administrative information to Oxford as may be necessary for compliance by Oxford with state and federal law, as well as for Oxford's administrative purposes. Oxford and Primary Care Physician agree that medical records of Members shall be treated as confidential so as to comply with all federal and state laws and regulations, provided, however, that Primary Care Physician agrees that he/she shall provide access to all medical records of Members to appropriate personnel of the Departments of Health and Senior Services and/or Banking and Insurance in compliance with all applicable statutes and regulations.

20. Complaint and Grievance Procedure. Any complaint or grievance that Primary Care Physician may have arising under this Agreement, except concerning any action taken under Paragraph 7 hereof, shall be filed in writing with Oxford's Medical Delivery Department. The Medical Delivery Department shall attempt to resolve that complaint or grievance within 30 days of its receipt of the complaint or grievance. Primary Care Physician shall have 15 days from receipt of the Medical Delivery Department's written decision to file a written appeal with Oxford's Regional Medical Director. The Regional Medical Director shall respond in writing to the appeal within 30 days of its receipt. Any complaint or grievance which at the completion of this process is not fully resolved to Primary Care Physician's satisfaction, may be submitted to arbitration pursuant to Paragraph 11 hereof.

OXFORD HEALTH PLANS (NJ), INC.

ATTACHMENT A-1

COMMERCIAL/FREEDOM NETWORK

Oxford Members: Under the terms of this Agreement, Primary Care Physician agrees to render service to Oxford Members covered under Oxford's commercial/Freedom Network. The rates applicable to said Oxford Members are shown below.

Primary Care Physician will be reimbursed in accordance with the rates shown in the previous agreement with Oxford.

Billing Requirements:

All claims must clearly indicate Current Procedural Terminology (CPT) codes, as defined by the American Medical Association (AMA), for all services provided. Claims not conforming to these guidelines will be denied.

OXFORD HEALTH PLANS (NJ), INC.

ATTACHMENT A-2

COMMERCIAL/LIBERTY NETWORK

Oxford Members: Under the terms of this Agreement, Primary Care Physician agrees to render service to Oxford Members covered under Oxford's commercial/Liberty Network. The rates applicable to said Oxford Members are shown below.

Primary Care Physician will be reimbursed in accordance with the rates shown in the previous agreement with Oxford.

Billing Requirements:

All claims must clearly indicate Current Procedural Terminology (CPT) codes, as defined by the American Medical Association (AMA), for all services provided. Claims not conforming to these guidelines will be denied.

OXFORD HEALTH PLANS (NJ), INC.

ATTACHMENT A-3

MEDICARE

Oxford Medicare Members: Under the terms of this Agreement, Primary Care Physician agrees to render service to Oxford Members covered under Oxford's Medicare risk program. The rates applicable to Medicare risk program Members are shown below.

XX% of the participating regional Medicare fee schedule

Billing Requirements:

All claims must clearly indicate Current Procedural Terminology (CPT) codes, as defined by the American Medical Association (AMA), for all services provided. Claims not conforming to these guidelines will be denied.

OXFORD HEALTH PLANS (NJ), INC.

ATTACHMENT A-4

MEDICAID

Oxford Medicaid Members: Under this Agreement, Primary Care Physician agrees to render service to Oxford Members covered under Oxford's Medicaid plans. The rates applicable to said Oxford Members are shown below.

Primary Care Physician will be reimbursed in accordance with the rates shown in the previous agreement with Oxford.

Billing Requirements:

All claims must clearly indicate Current Procedural Terminology (CPT) codes, as defined by the American Medical Association (AMA), for all services provided. Claims not conforming to these guidelines will be denied.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION ESSEX COUNTY

JOHN IVAN SUTTER, M.D., P.A.,
On behalf of himself and all others similarly situated
Plaintiff,

v.

OXFORD HEALTH PLANS, INC.
Defendant.

DOCKET NO. ESX-L-6644-02
CIVIL ACTION

ORDER DISMISSING CASE AND REFERRING CLAIMS TO ARBITRATION

THIS MATTER having been opened to the Court by defendant Oxford Health Plans, Inc. ("Oxford"), upon application, pursuant to N.J.S.A. 2A:24-1 and R. 4:6-2(e), for an Order dismissing this action and compelling arbitration of the claims in Plaintiff's Amended Complaint, and the Court having considered the submissions of the parties, and having heard argument of counsel, the Court having opined on the record following oral Argument on October 25, 2002 that this action should be dismissed and the claims asserted in the Amended Complaint referred to arbitration, and for good cause shown,

IT IS on this 21st day of Nov. 2002;

ORDERED that Plaintiff's Amended Complaint is hereby dismissed and the claims in Plaintiff's Amended

Complaint are hereby referred to arbitration in accordance with the provisions of the Primary Care Physician Agreement between plaintiff and Oxford; and it is further

ORDERED that all procedural issues including, but not limited to, the determination of class certification, shall be resolved by the arbitrator; and it is further

ORDERED that a copy of this Order shall be served on all counsel of record by plaintiff's counsel within seven (7) days.

/s/ Stephen J. Bernstein, J.S.C.
Honorable Stephen J. Bernstein, J.S.C.
[stamp: Stephen J. Bernstein, J.S.C.]

_X_ Opposed
___ Unopposed

Re: 18 193 20593 02
John Ivan Sutter, M.D.
VS
Oxford Health Plans, Inc.

APPENDIX A

AMERICAN ARBITRATION ASSOCIATION

Case No. 18 193 20593 02

JOHN IVAN SUTTER, M.D., ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, *Claimant*,

v.

OXFORD HEALTH PLANS, INC., *Respondent*.

MEMORANDUM AND ORDER

Dr. Sutter asserts that this case can be maintained as a class action. Oxford seeks by motion to have the case declared not a class action.

Prior Proceedings

Dr. Sutter originally began this case as a part of a larger class action case in the Superior Court of Essex County, New Jersey in April 2002. Dr. Sutter, a physician, was seeking from Oxford damages and other relief arising out of allegations that, under a Primary Care Physician Agreement between Dr. Sutter and Oxford (the "Agreement"), Oxford failed to pay claims and reduced payment on claims as a result of Oxford's improper claims processing tactics.

Oxford moved in the Essex County Superior Court to stay Dr. Sutter's civil class action on the ground that the underlying contract between Dr. Sutter and Oxford required that Dr. Sutter's claims be submitted to arbitration. Oxford was successful in its application to the Court. By order dated October 25, 2002, the Court ordered that Dr. Sutter's Amended Complaint be dismissed and that the matters raised should properly be referred to arbitration in accordance with the Agreement.

Thereafter, Dr. Sutter applied to the Superior Court for an order certifying the case as a class action and determining the class. This motion was denied by order dated November 21, 2002. The Court ordered that all procedural issues including, but not limited to, the determination of class certification, be resolved by the arbitrator.

In March, 2003, having been appointed arbitrator in this case, I conferred with the parties about how to proceed.

It was noted at that time that the Supreme Court of the United States had granted certiorari in a case called Green Tree Financial Corp. et al. v. Bazzle et al. (Docket No. 02-634). That case involved issues that might control the determination of the class action issues in this arbitration. Oral argument in that case had been scheduled for April 23, 2003 and a decision by the Supreme Court was expected before early July. It appeared sensible to take no action on the class action issues in this arbitration until the determination of the Green Tree case bad been received and analyzed. Accordingly, in Procedural Order No. 1, all proceedings in this arbitration were stayed until further order of the arbitrator.

On June 23, 2003 the Supreme Court rendered a decision in the Green Tree case. Pursuant to the agreement of the parties, each provided me with a letter outlining their respective views about the meaning of the Green Tree case for this arbitration. At a conference with the parties it was agreed that under the Green Tree case, I must determine whether the parties' Agreement allows for class action arbitration. As outlined in procedural Order No. 2, Oxford moved for a determination that this arbitration cannot be maintained as a class action. The parties provided extensive briefs on this issue. The motion is determined as provided in this memorandum and order.

Discussion

It is axiomatic that questions of Arbitrability begin with an analysis of the parties' agreement. This is particularly true since the Green Tree case. It was widely supposed that the Supreme Court would rule, as some lower Federal Courts had, that the Federal Arbitration Act does not allow class actions in arbitration unless the parties have specifically agreed to class action arbitration. It can be noted that neither in the Green Tree case nor in this case does the arbitration clause contain any such express mention of class action arbitrations.

While commentators will no doubt spend much ink and learning on the several opinions the divided Supreme Court issued, one thing seems clear to me at least: a blanket prohibition on arbitration class actions without specific authorization in the arbitration clause was firmly rejected. The argument to that effect by the Petitioner and the *amici* persuaded only three Justices. It can be argued that all of the remaining six, explicitly or implicitly, believed that class action arbitration without specific authorization is not impossible, but is rather a question of construction of the parties' agreement. In any event, whatever else *Green Tree* stands for, it means that whether a class action in arbitration is possible turns on the interpretation of the parties' agreement and that such interpretation is to be made by the arbitrator. I therefore commence analysis of this case with the premise that a class action arbitration is a possible outcome and that it is for me, as arbitrator, to make that determination.

I further note that in this case the prior determination of the Superior Court of Essex County admits the possibility that class action arbitration is available in this case. It could be argued that under the *Green Tree* case, the Court did exactly the right thing, that is it sent the case to arbitration with the specific statement that "all procedural issues including, but not limited to, the determination of class certification, shall be resolved by the arbitrator." The Court may have thought that it had already determined that a class action was available, with only the procedural issues, such as determination of the actual class, left for the arbitrator. The parties in this case have agreed that I should proceed to make the determination, which I do in this memorandum, *de novo*.

The Arbitration Clause

To begin the analysis at the beginning, we turn first to the arbitration clause in the Agreement. It provides in part:

> No civil action concerning any dispute arising under this agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New

Jersey, pursuant to the Rules of the American Arbitration Association with one arbitrator.

This clause is much broader even than the usual broad arbitration clause. The introductory phrase, "No civil action concerning any dispute arising under this agreement shall be instituted before any court," is unique in my experience and seems to be drafted to be as broad as can be. "No civil action" must mean no civil action of any kind whatsoever. The clause prohibits civil actions in law, equity, admiralty or even probate. No such action shall be instituted in "any court." Any court includes any Federal or State Court, any foreign court or the Court at the Hague. Taken together, this phrase has the effect of prohibiting any conceivable court action concerning any dispute under the Agreement. It would not be possible to draft a broader or more encompassing clause.

Having prohibited all conceivably possible civil actions, the clause takes this universal and unlimited class of prohibited civil actions and says, "and all such disputes shall be submitted to final and binding arbitration ..."

This means that the clause sends to arbitration "all such disputes," which, apart from the prohibition, could have been brought in the form of any conceivable civil action. Since there can be no dispute in any court without a civil action of some sort, the disputes that the clause sends to arbitration are the same universal class of disputes the clause prohibits as civil actions before any court. It follows that the intent of the clause, read as a whole, is to vest in the arbitration process everything that is prohibited from the court process.

A class action is plainly one of the possible forms of civil action that could be brought in a court concerning a dispute arising under this Agreement. In fact, a class action in court is just what Dr. Sutter commenced in the first place.

Therefore, because all that is prohibited by the first part of the clause is vested in arbitration by its second part, I find that the arbitration clause must have been intended to authorize class actions in arbitration. Indeed, to avoid a finding that such was the parties' intention, it would be necessary for there to be an express exception for class actions in the prohibition. Such a carve-out cannot be inferred absent some clear manifestation of such intent. Similarly, that class actions in court are absolutely prohibited by the first part of the clause but are at the same time not allowed under the second part would mean that class actions are not possible in any forum. In my view, that reading cannot be inferred in the absence of a clear expression that such a bizarre result was intended.

Accordingly, I find that, on its face, the arbitration clause in the Agreement expresses the parties' intent that class action arbitration can be maintained.

In addition, I note that, since Oxford successfully invoked the arbitration clause to prohibit a class action in court, it ought to be bound by judicial estoppel from arguing in this arbitration that the class action part of the case is not governed by the "and all such disputes [including the class action it has just successfully had stopped] shall be submitted to final and binding arbitration" clause.

Since I do not find that the clause is ambiguous, it is not necessary to pass on the *contra proferentem* arguments.

The Agreement as a Whole

It remains to discuss Oxford's arguments that the agreement read as a whole limits the possible interpretation of the arbitration clause to eliminate class actions. While Oxford notes correctly that the Agreement must be viewed as a whole, I do not find persuasive its contentions that other provisions of the Agreement undermine what appears to be facially allowed by the arbitration clause.

Oxford notes, for example, that the parties to the agreement are only Dr. Sutter and Oxford. The contract repeatedly refers to those parties as Oxford, on the one hand, and the "Primary Care Physician," "his/her" or "he/she" on the other hand. Paragraph after paragraph, Oxford notes, the contract defines the duties and obligations of each party, without a single reference to any other physician or health care provider.

This argument is not persuasive. Every contract, except one that expressly refers to class arbitration, will necessarily deal only with the parties to the particular contract. It can be noted that similar language in the contracts in the *Green Tree* case did not cause any of the lower courts, or the Supreme Court, to conclude as a matter of law that the parties thereby intended to preclude class arbitration. Indeed, the whole argument seems to me to be beside the point. In a class arbitration, the members of the class are not necessarily parties to the same contract; rather, they have similar or identical contracts with the same defendant that raise the same or similar issues. The references in the Agreement to individual parties, accordingly, have no bearing on whether this Agreement allows class arbitrations.

The ADR Clause in the Agreement

The Agreement contains, in addition to the arbitration clause discussed above, an ADR clause that allows for adjustment of certain disputes within a procedure maintained internally by Oxford. Oxford also argues that the ADR clause requires that, before Dr. Sutter may pursue arbitration, he must attempt to resolve his dispute through this ADR process.

Oxford notes that the ADR procedure is mandated by New Jersey law to provide a mechanism for providers to resolve disputes on payment of claims arising from individual contracts. In 2001, Oxford updated its Provider Reference Manual to provide the mandated ADR process for the reviews and appeals set forth in these regulations.

Oxford argues that to allow class arbitration to dispense with this individual internal dispute resolution mechanism would subvert the entire statutory scheme. Interpreting the contract to provide for "class arbitration," Oxford argues, would be fundamentally inconsistent with New Jersey law and regulations.

Finally Oxford argues that the explicit terms of the contract permit arbitration only for physicians who have exhausted their disputes through this ADR grievance procedure. This language alone, it argues, precludes "class arbitration" on behalf of all New Jersey Oxford-affiliated physicians, many thousands of whom have never asserted a grievance, let alone exhausted this contractually mandated procedure.

I do not accept Oxford's arguments. With respect to the situation of Dr. Sutter himself, the parties' failure to raise this issue throughout the court proceedings prior to this arbitration indicates that they interpret the ADR clause as not being a condition precedent. Moreover, their failure to raise it as a bar it seems to me to amount to a waiver.

I interpret the reference at the end of the ADR clause that "Any complaint or grievance which at the end of [the ADR] process is not resolved ... may be submitted to arbitration pursuant to [the arbitration clause] to mean just what it says. The ADR process is non-binding; it may or may not result in a resolution of a dispute. If it does not, the provider is free to pursue arbitration. I thus interpret the ADR procedure as an alternative, that the provider can pursue if he chooses, and his use of the ADR procedure does not preclude arbitration if he does not like the ADR result. It is not meant to be a condition precedent to arbitration. Similarly, the ADR clause is found at the end of the Agreement, unattached to the arbitration clause. Contracts that mandate ADR before arbitration typically structure the progression from negotiation to mediation to arbitration in a single clause.

Dr. Sutter's brief refers to the extensive discussion of the same ADR clause by the New Jersey court in connection with a class action against another insurer. Oxford notes correctly that that agreement in that case does not involve arbitration. Nevertheless, the court's analysis of the purpose and application of the ADR clause is consistent with the reading adopted here that this clause is essentially for the benefit of the provider and is not to be used as a condition precedent.

Accordingly, I find that the ADR clause has no current application to Dr. Sutter. As to other members of the class or classes the bearing the ADR clause may have will be one of the issues in administration of the class action. I am making no finding about the same at this point. That issue, as all others relating to the actual class action, are reserved to be decided in further appropriate proceedings.

Rules of the AAA

Finally, Oxford says that the reference in the arbitration clause to the rules of the American Arbitration Association negate class actions. I disagree. The current AAA rules are silent on the question of class actions. The procedures on consolidation address issues different from those presented by class actions. Consolidations are imposed, by courts, and under special AAA procedures, for reasons unique to each case. These can include efficiency and the avoidance of inconsistent results. While consolidations are imposed, a class action always provides the class members the opportunity to opt out of the proceedings. I therefore conclude that the reference to AAA procedures in the Agreement is not inconsistent with maintaining this case as a class action.

Conclusion

For the foregoing reasons this case shall be maintained as a class action.

This determination does not in any way decide any of the issues relating to the class action itself, such as the definition of the class or classes, the form of notice to class members and similar matters. Nor does it reflect any views on the merits of the underlying case. It was originally agreed with the parties that consideration of all such matters would be deferred until it was first concluded that this case would or would not be maintained as a class action.

A status conference will be scheduled promptly to address what further proceedings will be required.

It is so ordered.

/s/ W.L.D. Barrett

September 23, 2003

W.L.D. Barrett, Arbitrator

AMERICAN ARBITRATION ASSOCIATION
Commercial & Class Action Arbitration Tribunal

IN THE MATTER OF THE ARBITRATION BETWEEN

JOHN IVAN SUTTER, M.D.

v.

OXFORD HEALTH PLANS, INC.

Re: 18 193 20593 02

PARTIAL FINAL CLASS DETERMINATION AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into between the above-named parties and dated October 25, 2002, contained in a Primary Care Physician Agreement (the "Agreement") between Claimant Dr. Sutter and Respondent Oxford Health Plans, Inc. ("Oxford"), and having been duly sworn, and having duly heard the proofs and allegations of the parties, and for the reasons set forth below, do hereby make this

PARTIAL/FINAL AWARD pursuant to Rule 5 of the Supplementary Rules for Class Arbitrations of the American Arbitration Association (the "Rules") as follows:

The Proposed Class

Dr. Sutter proposes to define the class in this arbitration as follows:

> All individual physicians and physician groups (including, but not limited to, medical doctors and doctors of osteopathic-medicine), regardless of specialty, who provided services to any person who is a subscriber of, or is insured by, Oxford Health Plans, Inc. ("Oxford") in the class period of December 11, 1996 through the present.[1]

Prior Proceedings

Dr. Sutter originally began this case as a part of a larger class action case in the Superior Court of Essex County, New Jersey in April, 2002. Dr. Sutter, a physician, was seeking from Oxford damages and other relief arising out of allegations that, under the Agreement, Oxford failed to pay claims and reduced payment on claims as a result of Oxford's improper claims processing tactics.

Oxford moved in the Essex County Superior Court to stay Dr. Sutter's civil class action on the ground that the underlying contract between Dr. Sutter and Oxford required that Dr. Sutter's claims be submitted to arbitration. Oxford was successful in its application to the Court. By order dated October 25, 2002, the Court ordered that Dr. Sutter's Amended Complaint be dismissed and that the matters raised should properly be referred to arbitration in accordance with the Agreement.

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[1] Dr. Sutter filed his class-wide arbitration demand on December 11, 2002. New Jersey's contract statute of limitations is six (6) years. *See* N.J.S.A. § 2A:14-1.

Dr. Sutter also applied to the Superior Court for an order certifying the case as a class action and determining the class. This motion was denied by order dated November 21, 2002. The Court ordered that all procedural issues including, but not limited to, the determination of class certification, be resolved by the arbitrator.

By agreement of the parties, this case was stayed until the determination of the United States Supreme Court in *Green Tree Financial Corp, et al. v. Bazzle et al.*, which was then pending, could be analyzed.

Thereafter, and before the Rules became effective, the parties briefed and I determined that the arbitration clause in the Agreement allowed for class actions (Memorandum and Order of September 23, 2003, a copy of which is attached to and incorporated into this award as Appendix A).

The parties agreed in 2004 that the Rules would govern the future proceedings in this case, including the class determination matters decided in this award.

After extensive discovery, the class determination issues were briefed and I heard the parties in oral argument at a docketed hearing on October 29, 2004. Based on all of the foregoing, my determination of the class issues is as follows.

Discussion

Before dealing with the specific findings required by Rule 4, it is necessary to address two legal issues raised by Oxford. These are first, whether or not the determination of the United States Court of Appeals for the

11th Circuit in *Klay et al. v. Humana, Inc., et al.* (382 F.3d 1241, 11th Circuit, Fla., 2004, cert. den. 125 S Ct 877, 2005) decided September 1, 2004 determines the outcome of this case. Dr. Sutter brought a court proceeding, originally filed against Oxford, Horizon Blue Cross Blue Shield of New Jersey, United Healthcare, HealthNet and CIGNA that was severed as to each defendant, and the actions against United Healthcare, HealthNet and CIGNA were transferred to the Federal Court for the Southern District of Florida. There, under a ruling of the Multi-District Panel, all of these similar class actions of physicians against Health Maintenance Organizations ("HMOs") were being heard. Oxford argues that principles of collateral estoppel flowing from the *Klay* case bar Dr. Sutter from obtaining class certification in this arbitration.

The effect of the *Klay* Decision

Oxford argues that Klay is directly applicable to this case. It says that the purported classes alleged that defendants, HMOs, agreed to pay physicians under their respective contracts and that the defendants systematically delayed, denied and diminished the agreed payments. This end was accomplished by the same general means Dr. Sutter asserts here: automated systems worked down-coding and grouping or bundling, ignored modifiers that would increase fees payable and processed claims in a way that resulted in payment times that exceed by many times what was provided by the respective contracts and applicable state standards.

Even assuming that the legal issues, essentially breach of contract, were common to the purported classes, the Eleventh Circuit held that class certification of these contract claims was improper and reversed that part of the decision of the Southern District of Florida.

The *Klay* case is new, carefully reasoned and from a very important court. It requires the arbitrator to analyze it with the greatest care, as it is a plain determination of law connected to issues to be decided here. It cannot be disregarded. Mindful of this principle, I have read and re-read the *Klay* opinion. After careful consideration, I cannot agree with Oxford that it applies to this case as a controlling precedent.

The reason is not far to seek. The *Klay* court was confronted with a multi-district consolidation of hundreds of class actions against as many as seven different HMOs. The opening words of the opinion speak volumes: "This is a case of almost all doctors vs. almost all major health maintenance organizations."

In analyzing the breach of contract claims under state law, the court said "this case involves the actions of many defendants over a significant period of time and that each defendant throughout this period utilized many different forms of contracts." It further noted, "this is not a situation in which all plaintiffs signed the same form contract." It also noted, "another crucial reason why the plaintiffs cannot establish predominance of class-wide facts on their breach of contract claims is that, although each of the defendants allegedly breached their contracts in the same general ways, they did so through a variety of specific means that are not subject to generalized proof for a large number of physicians."

On the breach of the prompt-pay claims, the Eleventh Circuit said "the most immediate problem with certifying a nationwide class for this issue is that only 32 states have prompt-pay statutes at all, and of those, only five states expressly provide a cause of action."

Dr. Sutter's case seems to me to be on an entirely different footing from the immense problems faced by the Eleventh Circuit. In this case there is only one state law involved, that of New Jersey. There is only one HMO involved, Oxford. It is alleged that the contracts the physicians who would make up the class signed are essentially identical.

Of significant importance, Dr. Sutter alleges that Oxford systematically processed claims, using various computer programs, in a way to disadvantage the doctors in breach of their contracts. Dr. Sutter alleges that Oxford processed these claims as submitted, without requiring other back-up material. The gist of his claim is that the forms submitted were somehow treated by the system in a way that caused disadvantage to the doctors. This claim would presumably have to be established by expert testimony about the automated systems Oxford employed. That it is a difficult problem of proof is apparent. It is also obvious that it would be virtually impossible for any individual doctor to afford the voluminous expert testimony that would be required if these cases proceeded individually. The Eleventh Circuit itself noted in the portion of the *Klay* opinion which affirmed class-action treatment with respect to certain alleged Federal RICO allegations, that Federal Rule 23 governing class actions has as a dominant idea the vindication of "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." I believe that this factor figures importantly in the current case.

For these reasons, I find that the *Klay* opinion, despite its erudition, is not applicable to the specific facts of this case.

Dr. Sutter argues that whatever *Klay* may mean, this arbitration was brought under and is governed by the laws of the State of New Jersey. Dr. Sutter argues that New Jersey courts have repeatedly certified physician class actions involving virtually identical claims to those asserted by Dr. Sutter. He cites *Zakheim v. Amerihealth* and *Malloy v Amerihealth* and most importantly, his own case, *Sutter v. Horizon*. (I attach no significance to the Appellate Division's refusal to hear an appeal from the Superior Court.) These cases plainly show that New Jersey Courts would most probably certify a class in this case. Oxford's attempt to distinguish the AAA Rules from the New Jersey class action rules is not persuasive.

Collateral Estoppel

Even if the *Klay* decision is not controlling precedent here, and as noted above I do not believe that it is, Oxford asserts that Dr. Sutter cannot have a class action on the breach of contract claims because his participation in the *Klay* case binds him by collateral estoppel. I disagree.

Collateral Estoppel is an equitable doctrine that prevents a party from re-litigating in a new forum and issue that he has litigated unsuccessfully in a previous case or forum. Before it can be successfully invoked as a defense, it must be shown that Dr. Sutter had a full and fair opportunity to have the question of his New Jersey contract claims heard and decided.

Dt. Sutter argues that under New Jersey law, which is applicable to this case, collateral estoppel "should not be rigidly applied if the party sought to be precluded did not have an adequate opportunity or incentive to obtain a full and fair adjudication of the initial action." *Barker v. Brinegar*, 346 N.J. Super. 558, 566 (App. Div. 2002) (citing Restatement (Second) of Judgments). "Ultimately, the court must employ a discretionary weighing of economy against fairness." *Konjeczny v. Micciche*, 305 N.J. Super. 375, 385 (App. Div. 1997) (citation omitted). "[C]ollateral estoppel is an equitable doctrine and need not be applied 'if there are sufficient countervailing interests,' or if it would not be fair to do so." *Matter of Estate of Dawson*, 136 N.J. 1, 23 (1994).

Dr. Sutter's cases were sent to Florida as "tag-along" cases under the Federal Multi-District Rules. I do not think it can be denied that his case was a very small fish in a very large pond. He asserted credibly that his opportunity to influence the arguments of the lead plaintiffs before the 11th Circuit was precisely zero. Under these circumstances, I doubt that the 11th Circuit knew that Dr. Sutter's case even existed. While he may be bound in those specific cases against other HMOs, there has been no showing here that the claims the classes he purported to represent against other HMOs are identical to the claims he asserts against Oxford here.

Since I have some equitable discretion under New Jersey law not to apply collateral estoppel, I think it best to use that discretion to determine that this is not an appropriate case for collateral estoppel.

I have concluded for the foregoing reasons that the *Klay* opinion is not controlling here and that collateral estoppel from *Klay* does not bar Dr. Sutter. I proceed to consider whether or not this case meets the requirements of Rule 4 of the Rules of the American Arbitration Association.

Commonality

The overarching issue Dr. Sutter presents in this case is whether or not there is something in the various automated systems Oxford employs to process the hundreds of thousands of claims it receives that systematically reduces the payments providers ought to receive.

Oxford argues that when physicians sign up with Oxford, they naturally expect to be paid somewhat less than they would for similar services if they billed patients directly. In return, they are offered a larger pool of patients and accordingly find the arrangement beneficial. This argument misses the point of Dr. Sutter's basic claim. It is not that those payments received are lower on an absolute basis; rather, he says the system produces lower payments because it is cheating him and is designed and/or operated in a dishonest way. This, if true, would constitute a breach of contract.

It is not reasonable to suppose that Oxford's vast system operates solely to cause disadvantage to Dr. Sutter. Nor is it reasonable to suppose that only pediatricians are singled out for the alleged abuse. Accordingly, it seems to me that the basic issue in this case, whether or not the system is honest, is a classic case for class action treatment.

The analysis of the system and its operations is plainly a question for experts, and I expect that expert testimony would constitute the bulk of the proof presented. As noted above, this analysis, because of the size and complexity of the Oxford operation, is bound to be complicated and very expensive. It would be out of the question for Dr. Sutter or any other individual physician to be able to afford experts of the kind and quality that would be able to detect and explain the improper conduct Oxford is allegedly engaging in. These experts would also have to testify in a way that would allow the Claimant to carry the burden of proof on this issue.

This fact alone makes the right of each individual to bring his or her own arbitration essentially valueless, because he or she could not afford to develop the proof that would be needed.

Dr. Sutter has standing to raise the basic question. It follows that the class ought initially to be that of all providers, and not be limited to pediatricians. If at trial, no nefarious scheme is found, then the case will end. If, on the other hand, Dr. Sutter is correct in his assertion, and a scheme is found that disadvantages providers in breach of their contractual expectations, then the issue of sub-classes for additional liability and remedy phases of this case could be considered. That, I think, is a bridge best crossed when and if we come to it, and I am making no determination with respect to sub-classes at this point. This approach is essentially a bifurcation of this case, addressing first the fundamental liability issue.

Because I think that bifurcation is a suitable approach to the obvious complexities of this case, I do not think the result in *Sutter v. Horizon* is controlling here. In that case, the court found that the bundling and down coding claims of the different specialties of providers was too complicated for a class action. I am temporarily avoiding that complexity; when and if we reach it, it may well be that separate arbitrations will have to be considered. However, the members of the class will at least start with the major issue determined, which is bound to simplify and expedite the further proceedings, whatever form, they may take. I think that difference is enough to avoid collateral estoppel as well. Moreover, as noted above, I have equitable power not to apply collateral estoppel. Since bifurcation was not apparently an option offered in the *Horizon* case, I think Dr. Sutter should be allowed to proceed.

Class Certification

Rule 4(a) provides:

> The arbitrator shall consider the criteria enumerated in this Rule 4 and any law or agreement of the parties the arbitrator determines applies to the arbitration. In doing so, the arbitrator shall determine whether one or more members of a class may act in the arbitration as representative parties on behalf of all members of the class described.

Rule 4 specifies the findings I must make, and on the basis of the preceding analysis I do so as follows:

(1) The class is so numerous that joinder of separate arbitrations on behalf of all members is impracticable;

It appears that this factor is not seriously disputed. The purported class consists of some 16,000 members. Joining separate arbitrations for each would be far less efficient than deciding the central issues on a class basis.

(2) There are questions of law or fact common to the class;

As noted above, the basic factual issue in this case is whether or not Oxford engaged in a scheme to deprive the doctors of what it should have been paying them under their contracts. It seems clear to me that if there was such a scheme, it would have been applied across the board. I am making no determination at this time that there ever was or could have been such a scheme. However, the very complex proof needed to make the factual determination seems to me to be common to all members of the class.

(3) The claims or defenses of the representative parties are typical of the claims or defenses of the class;

If Oxford indeed had such a scheme, I find that it would be illogical and extremely peculiar if it had chosen to apply it only to pediatricians. Thus, whether or not a scheme existed can be litigated by a pediatrician as well as by a surgeon. How the scheme, if there was one, affected each specialty may differ in kind and amount. That question, if we ever reach it, may require creation of sub-classes. It is premature to attempt to create such classes at this time when it has not been established that Oxford did anything at all that would be actionable.

(4) The representative parties fairly and adequately protect the interests of the class;

(5) Counsel selected to represent the class will fairly and adequately protect the interests of the class;

There is no dispute that Dr. Sutter and his counsel are competent to represent the class, as I am now defining it. When and if sub-classes are called for, this matter will be revisited.

(6) Each class member has entered into an agreement containing an arbitration clause which is substantially similar to that signed by the class representative(s) and each of the other class members.

All the agreements Oxford had with health care providers had arbitration clauses the same as or substantially the same as that found in Dr. Sutter's contract.

However, since May 2003, Oxford has added a provision to the standard arbitration clause specifically excluding the signing physician from class action arbitration. Dr. Sutter argues that the addition to the clause represents a contract of adhesion and is unenforceable.

I think that question is better resolved in the New Jersey courts. On its face, the clause prohibits class arbitration. Whether or not it is unenforceable under New Jersey law seems beyond my powers in making a class determination. Accordingly, I am excluding from the class for this arbitration all those persons whose contracts contain a prohibition on class arbitrations.

The second group is that of physicians with no contract with Oxford, who seek reimbursement when an Oxford insured goes "out of plan." Dr. Sutter notes that the New Jersey Prompt Pay statute contains an arbitration provision, which he argues, ought to allow them to satisfy the requirements of an arbitration clause. Oxford notes, however, correctly in my view, that the statute allows for arbitration only after a step by step dispute resolution process has been followed. I have no power to simply wipe out that process and put those claims directly into arbitration. Accordingly, I am not including those physicians in the class here certified.

Except for the foregoing, the class proposed by Dr. Sutter meets the requirements of Rule 4(a).

I turn to the additional requirements of Rule 4(b), which provides that if Rule 4(a) has been satisfied, I must also find:

That the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class arbitration is superior to other available methods for the fair and efficient adjudication of the controversy.

The Rule instructs me to consider the following matters:

(1) The interest of members of the class in individually controlling the prosecution or defense of separate arbitrations;

The question of whether or not Oxford employed a scheme predominates all others. There would be no particular reason why any individual would wish to employ experts to examine and testify about these complex issues, even if it were economically feasible to do so, which as indicated above is plainly not the case.

(2) The extent and nature of any other proceedings concerning the controversy already commenced by or against members of the class;

The record does not show that there are any other proceedings.

(3) The desirability or undesirability of concentrating the determination of the claims in a single arbitral forum;

It is desirable to have the existence or not of the scheme determined in one forum. If it is found that such a scheme was practiced, then how it affected various members of the class will have to be dealt with. If all of these contracts were breached, then a remedy will be found. Procedures could be sub-classes within this arbitration, separate arbitrations or some combination thereof. I think that determination of the basic question will be sufficiently difficult that I am not addressing those issues at this time. If the Claimant cannot carry the burden of proof that there was a scheme, then these issues may never have to be addressed.

(4) The difficulties likely to be encountered in the management of a class arbitration.

It would indeed be a naive arbitrator who did not recognize that, if a scheme is found and sub-classes have to be created, management of this case will be difficult. However, I do not see why the difficulties would be greater than or different from those that have been faced and overcome by the courts in New Jersey in similar cases. Should we reach that point, it may be that separate arbitration cases for each physician would be suitable, once the basic question of the scheme is established. Arbitration is a flexible tool and I am confident that when and if that point is reached, good management will handle the individual claims in a fair and expeditious manner. Since the alternative, denying the class, is essentially to deny these doctors any realistic possibility of redress, I believe that we should go ahead and do the best we can.

The parties have not shown me how any other device than a class action can deal with the fundamental issue in this case. I find that a class action is the only practical way that justice can be done in this situation.

Accordingly, I find that the requirements of Rule 4(b) have been satisfied.

On the basis of the foregoing my award is as follows:

PARTIAL/FINAL AWARD

Definition of the Class

For purposes of all further proceedings in this arbitration the class of Claimants is defined and certified as follows:

> All individual physicians and physician groups (including, but not limited to, medical doctors and doctors of osteopathic medicine), regardless of specialty, who provided medical services to any person who is a subscriber of, or is a member of a health plan administered by Oxford Health Plans, LLC. ("Oxford") in the class period of December 11, 1996 through December 31, 2004[2] and who have signed with Oxford a New Jersey provider agreement containing an arbitration clause the same as or similar to that in Dr. Sutter's contract. Excluded from the class are any individual physicians and physician groups (including, but not limited to, medical doctors and doctors of osteopathic medicine) who have executed provider agreements with Oxford that contain a prohibition on class action arbitrations.

The Claim of the Class

The Class alleges that:

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[2] Certification of a class of New Jersey physicians and physician groups who provided medical services through December 31, 2004, does not prohibit either party from recovering damages for bills submitted for medical services subsequent to December 31, 2004, as part of the final award in this class arbitration, nor does it prohibit either party from seeking such damages in another arbitration, subject to the limits imposed by the doctrines of res judicata and collateral estoppel.

Oxford has uniformly processed the claims for reimbursement submitted by over 16,500 physicians – regardless of the specialty of these doctors – through the use of the same automated software that arbitrarily delays, denies, impedes and reduces compensation for the medical services these doctors provide to members of Oxford's insurance plans.

The centerpiece of this case are the common practices carried out by Oxford's computer system that has been responsible for depriving physicians of proper reimbursement.

This computer system has not processed claims in accordance with the terms of the provider agreements – that is, based on the claims information submitted by the physician and his/her applicable fee reimbursement schedule.

Nor has Oxford's automated, uniform computer programs adjudicated claims in accordance with the requirements of New Jersey's statutory prompt pay laws.

Rather, Oxford's computer system, inter alia, has re-coded, manipulated, eliminated, bundled and downcoded claims submitted by physicians and has then processed these claims to achieve one common, class wide goal – to save Oxford substantial amounts of money and to pay less to doctors in breach of the provider agreements and in violation of the prompt pay statutes.

This has been done in an across-the-board fashion, not based upon any individualized review of claims or medical records for the services provided, but by preprogrammed, arbitrary computer software that has not been based on standard medical or objective coding practices.

The foregoing has damaged the members of the class in amounts to be determined.

Class Representative and Counsel

Dr. Sutter and his counsel are found to be adequate representatives of, and capable of protecting, the interests of the class in this arbitration.

Bifurcation for Further Proceedings

When and if it is determined that Oxford breached its agreements with the members of the class, the issue of sub-classes and suitable further proceedings will be considered, and no determination with respect to those matters is being made in this award.

Notice

Notice of this arbitration and the method for opting out of the arbitration shall be given to all members of the class in the Form of Notice attached to and made a part of this Award as Appendix B.

Stay

As required by the Rules, all proceedings in this arbitration are stayed for thirty days from the date of this award. If the parties proceed to the courts, this stay can be extended as appropriate, either by me or by the courts.

03/24/05	/s/ William L.D. Barrett
Date	**William L.D. Barrett**

Re: 18 193 20593 02
John Ivan Sutter, M.D.
VS
Oxford Health Plans, Inc.

APPENDIX A

AMERICAN ARBITRATION ASSOCIATION

Case No. 18 193 20593 02

JOHN IVAN SUTTER, M.D., ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, *Claimant*,

v.

OXFORD HEALTH PLANS, INC., *Respondent*.

MEMORANDUM AND ORDER
[DATED SEPTEMBER 23, 2003]

[REPRINTED AT PAGES 27-37]

APPENDIX B

AMERICAN ARBITRATION ASSOCIATION

JOHN IVAN SUTTER, M.D., P.A.,
on behalf of himself and all others similarly situated
Claimant,

v.

OXFORD HEALTH PLANS, INC.
Respondent.

AAA CASE NO. 18 193 20593 02

NOTICE OF CLASS DETERMINATION

This Notice May Affect Your Rights.

Please Read Carefully.

IF YOU ARE A PHYSICIAN OR PHYSICIAN GROUP WHO PROVIDED MEDICAL SERVICES TO ANY PERSON WHO IS A MEMBER OF A HEALTH PLAN ADMINISTERED BY OXFORD HEALTH PLANS LLC ("OXFORD") SINCE DECEMBER 11, 1996 AND YOU SIGNED A NEW JERSEY PARTICIPATING PROVIDER AGREEMENT WITH OXFORD CONTAINING AN ARBITRATION CLAUSE THAT DOES NOT PROHIBIT YOU FROM PARTICIPATING IN A CLASS ARBITRATION, PLEASE READ THIS NOTICE CAREFULLY. THIS

CLASS ARBITRATION MAY AFFECT YOUR RIGHTS.

I. WHY SHOULD YOU READ THIS NOTICE?

Your rights may be affected by the class action arbitration known as Sutter v. Oxford Health Plans, Inc., Case No. 18 193 20593 02, now pending before the American Arbitration Association, referred to in this Notice as the "Class Arbitration." This Notice is to inform you of the arbitrator's decision to certify the arbitration as a class action, provide details on the nature of the claims asserted against Oxford[1], and advise you of your right to participate in or exclude yourself from the Class Arbitration.

II. THE NATURE OF THE ACTION

This arbitration was originally filed by a physician, John Ivan Sutter, M.D., P.A. Dr. Sutter is a pediatrician practicing medicine in Clifton, New Jersey. Dr. Sutter, on behalf of himself, and on behalf of all New Jersey individual physicians and physician groups who executed contracts with Oxford filed this Class Arbitration against Oxford asserting, among other causes of action, breach of contract and statutory violations of the New Jersey Prompt Payment Act and the HINT Act alleging Oxford's failure to timely and appropriately pay physicians for the medical services they rendered to Oxford plan members and insureds. More specifically, Dr. Sutter seeks damages, on behalf of himself, and on behalf of physician providers, claiming that, among other things, Oxford continuously and systematically: (1) fails to make prompt and timely payment of medical claims; (2) refuses to provide compensation for a particular medical procedure by improperly contending that this procedure is routinely included in another procedure performed on the same date of service – known as "bundling" of claims; (3) unilaterally and retroactively reduces the amount of compensation paid for the medical services provided by changing the procedure code (CPT Code) to a procedure of lesser complexity – known as "downcoding" of claims; and (4) refuses to pay the appropriate compensation in cases where additional medical services were required to treat more complex medical conditions or separate and unrelated conditions – known as the refusal to recognize "modifiers."

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[1] When the term "Oxford" is used herein, it shall mean Oxford Health Plans LLC, and all of the health plans it administers. "Oxford" does not include, and this notice does not relate to, UnitedHealth Group or any of the health plans it or its affiliates or subsidiaries administer, except for Oxford Health Plans LLC and health plans that entity administers.

Oxford denies Dr. Sutter's allegations, and contends that it has appropriately processed and reimbursed the claims of its member physicians as required under the terms and conditions of its contracts with physicians. Oxford further contends that it has overpaid certain physicians, and may pursue such overpayments as defenses, offsets and/or counterclaims in this Class Arbitration.

A contested class certification hearing was held on October 29, 2004. Thereafter, the arbitrator certified a class of certain New Jersey individual physicians and physician groups who participate in the Oxford provider network and who rendered services to Oxford members and insureds, and appointed Dr. Sutter to represent the class, of which you may be a member.

III. WHAT RELIEF DOES THE CLASS SEEK?

Dr. Sutter is seeking compensatory damages and punitive damages on behalf of himself and other members of the class for medical services rendered (and supplies provided) which Dr. Sutter asserts that Oxford failed to pay timely or appropriately as a result of improper claims processing practices. Oxford denies Dr. Sutter's allegations and contends that its practices are fully consistent with the terms of the applicable provider agreements.

The arbitrator's class certification Order does not decide the merits of the claims of the class or Oxford's defenses, but rather only certifies this arbitration as a Class Arbitration. The arbitrator has not ruled on the merits of the claims asserted by the class or the denials and other defenses asserted by Oxford.

THERE IS NO ASSURANCE THAT AN AWARD WILL BE GRANTED TO DR. SUTTER AND THE CLASS OR, IF AN AWARD IS MADE, THAT IT WILL BE COLLECTED IN WHOLE OR IN PART.

IV. AM I AFFECTED BY THIS CLASS ARBITRATION?

You are a member of the Class certified by the arbitrator if you were or are:

> An individual physician or physician group (including, but not limited to, a medical doctor or doctor of osteopathic medicine), regardless of specialty, who provided medical services to any person who is a member of a health plan administered by Oxford Health Plans LLC ("Oxford") in the class period of December 11, 1996 through December 31, 2004, and who signed

with Oxford a New Jersey provider agreement containing an arbitration clause the same as or similar to that in a New Jersey participating provider agreement (providing that no civil action concerning any dispute arising under the agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association with one arbitrator) and which does not prohibit you from participating in a class arbitration.

V. THE ARBITRATOR, CLASS REPRESENTATIVE AND CLASS COUNSEL

The Arbitrator in this arbitration is William L. D. Barrett, Esq. Mr. Barrett graduated with a Bachelor's degree from Yale University in 1960, received his law degree from Harvard University in 1963, and has been a practicing lawyer since 1964. Mr. Barrett is currently a member of the law firm of Hollyer Brady Barrett & Hines LLP in New York, New York.

The Arbitrator appointed John Ivan Sutter, M.D. to act on behalf of the class. Dr. Sutter graduated with a Bachelor's degree from New York University in 1974, obtained his medical degree from Far Eastern University in 1978, and has been practicing medicine since 1979. Dr. Sutter is a board-certified pediatrician and maintains his medical practice in Clifton, New Jersey.

The Arbitrator also appointed Class Counsel to represent the interests of the class. The names of the attorneys and the firm designated to represent the Class are: Eric D. Katz, Esq. and David A. Mazie, Esq., partners of the law firm of Nagel Rice & Mazie, LLP in Roseland, New Jersey. Mr. Katz received a Bachelor's degree from Polytechnic University in 1988 and a law degree in 1991 from Pace University, and has been practicing law since 1991; Mr. Mazie received a Bachelor's degree from Rutgers University in 1983 and a law degree from George Washington University in 1986, and has been practicing law since 1986. The Arbitrator determined that Class Counsel is experienced and could adequately represent Dr. Sutter and the class. If you have any questions regarding the type of litigation in which Class Counsel is involved, you may contact Class Counsel at the address and e-mail address listed below. You will not be charged for Class Counsel's services. Rather, if Class Counsel obtains a recovery for the Class, Class Counsel will apply to the arbitrator for payment of reasonable attorney's fees and costs to be deducted from the funds recovered before the net proceeds are distributed to Class members.

You have the right to hire your own attorney and enter an appearance through counsel if you so desire. If you do so, you will be responsible for paying the attorney's fee. You have the right not to participate, or to exclude yourself ("opt-out") from the Class. The procedures and deadlines for excluding yourself from the Class are described in the next section of this Notice. You also have the right to seek the arbitrator's permission to intervene or appear in this Class Arbitration.

VI. DO I NEED TO DO ANYTHING NOW?

TO REMAIN IN THE CLASS: If you want to remain a member of the Class, YOU DO NOT HAVE TO DO ANYTHING AT THIS TIME. If Dr. Sutter is successful after an arbitration hearing on the merits or obtains a settlement, you may then be able to participate in any recovery obtained for the Class through additional proceedings or through a process to be administered by the arbitrator. If you remain part of the Class, you will be notified if there is any recovery and/or any procedures through which you may be required to participate to seek a recovery. ***As a Class member, you will be bound by all Orders of the arbitrator, including Orders which may be adverse to the class. Furthermore, as a Class member, any currently existing claims or causes of action as alleged in this Class Arbitration will be forever resolved by a final judgment in this case.***

Participating in this Class Arbitration will not terminate or affect any of your participating provider agreements with Oxford.

EXCLUDING YOURSELF FROM THE CLASS: If you want to be excluded from this Class, the Arbitrator will exclude you. To request exclusion, you must send a letter expressly stating that you wish to be excluded from the Class. This letter must be sent to the address listed below, and must be postmarked no later than ________________:

[RECIPIENT/ADDRESS TO BE AGREED UPON BY THE PARTIES]

If you choose to exclude yourself from the Class, you will not be allowed to participate in any recovery that might be paid as a result of a hearing or settlement of this Class Arbitration. You will not be bound by any decision in this Class Arbitration favorable to Oxford; and you may present any claims you have against Oxford by filing your own arbitration, or you may seek to intervene in this Class Arbitration. Should you exclude yourself from the Class, you will not be bound by any of the Orders of the arbitrator.

VII. FURTHER PROCEEDINGS

As noted, Oxford denies the allegations and claims made by Dr. Sutter. The next stage of the arbitration will include discovery and other pre-hearing proceedings; an arbitration hearing of this matter has not yet been scheduled. Any class member may attend hearings in this Class Arbitration. You may communicate with Class Counsel if you have evidence you believe would be helpful to establish the Class claims, and you may be asked by the parties to provide information relevant to the arbitration. Any information or evidence you provide to Class Counsel may be subject to discovery by Oxford.

VIII. WHO CAN I CONTACT WITH QUESTIONS?

PLEASE DO NOT CALL THE AMERICAN ARBITRATION ASSOCIATION OR THE ARBITRATOR. If you have questions regarding this Notice or the Class Arbitration to which it refers, you can obtain information in one of two ways.

First, you may contact Class Counsel by written correspondence. To do so, you may send a letter to Eric D. **Katz at Nagel Rice & Mazie, LLP, 103 Eisenhower Parkway, Roseland, New Jersey 07068, or send an e-mail to ekatz@nrmlaw.com.**

Second, you may obtain information from the Class Arbitration Docket available on the American Arbitration Association's Web site (www.adr.org).

AMERICAN ARBITRATION ASSOCIATION

Case No. 18 193 20593 02

JOHN IVAN SUTTER, M.D., ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, *Claimant*,

v.

OXFORD HEALTH PLANS, INC., *Respondent*.

Procedural Order No. 18
Determining Motion

July 6, 2010

Oxford has moved for reconsideration of the Memorandum and Order of September 23, 2003 (the "Clause Construction Award")[1], which found that the arbitration clause in the Agreement in this case allowed for class action arbitration. The Clause Construction Award is attached as Exhibit A; its findings and conclusions are incorporated in this memorandum. This case has proceeded as a class action since that time.

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[1] The Memorandum and Order is referred to in this Order as the Clause Construction Award because at the time it was issued, the Supplemental Rules for Class Action Arbitrations had not yet been adopted by the American Arbitration Association. The parties subsequently agreed that this case would proceed under and be governed by these Rules. When the Class Determination Award was entered, the Memorandum and Order was attached to it and both were subject to motions to confirm and vacate in the United States District Court for the District of New Jersey. The awards were confirmed and the confirmation was affirmed by the Third Circuit Court of Appeals.

Oxford seeks redetermination of the Clause Construction Award under a recent decision of the United States Supreme Court, *Stolt-Nielson S.A. v. Animal Feeds Int'l Corp.*, No 08-1198, 50 U.S.__, slip op. (April 27, 2010) Oxford argues that the *Stolt-Nielson* ruling has retroactive effect, and under the teaching of *Stolt-Nielsen*, the determination previously made in this case is incorrect, should be reversed and the class action proceedings discontinued.

For the reasons below, I agree with Oxford that *Stolt-Nielson* has retroactive effect, but I find that it does not require vacating the previous ruling.

Background

Dr. Sutter originally brought this case in April 2002 as a class action case in the Superior Court of Essex County, New Jersey. Dr. Sutter, a physician, was seeking from Oxford damages and other relief arising out of allegations that, under a Primary Care Physician Agreement between Dr. Sutter and Oxford (the "Agreement"), Oxford failed to pay claims and reduced payment on claims as a result of Oxford's allegedly improper claims processing.

Oxford moved in the Essex County Superior Court to stay Dr. Sutter's civil class action on the ground that the arbitration clause in the Agreement between Dr. Sutter and Oxford required that Dr. Sutter's claims be submitted to arbitration. Oxford was successful in its application to the Court. By order dated October 25, 2002, the Court ordered that Dr. Sutter's Amended Complaint be dismissed and that the matters raised should properly be referred to arbitration in accordance with the Agreement.

Thereafter, Dr. Sutter applied to the Superior Court for an order certifying the case as a class action and determining the class. That motion was denied by order dated November 21, 2002. The Court ordered that all procedural issues including but not limited to, the determination of class certification, be resolved by the arbitrator.

In March, 2003, when I had been appointed arbitrator in this case, *Green Tree Financial Corp, et al.* v. *Bazzle, et al.* (Docket No. 02-634) was pending before the Supreme Court of the United S[t]ates. It appeared sensible to take no action on the class action issues in this arbitration until the determination of the *Green Tree* case had been received and analyzed.

On June 23, 2003 the Supreme Court rendered a decision in the *Green Tree* case (539 U.S. 444). Pursuant to the agreement of the parties, each provided me with a letter outlining their respective views about the meaning of the *Green Tree* case for this arbitration. At a conference with the parties it was agreed that under the *Green Tree* case, I had to determine whether the parties' Agreement allows for class action arbitration. The parties agreed that I should proceed to make that determination *de novo*. Oxford then moved for a determination that this arbitration cannot be maintained as a class action. The parties provided extensive briefs on this issue.

I found, for the reasons discussed in the Clause Construction Award, that on its face, the arbitration clause in the Agreement expressed the parties' intent that class action arbitration could be maintained.

Discussion

Before discussing Oxford's present contentions in detail, it is necessary to note several points on which Oxford seems to me to be correct. First, this arbitration is governed by the Federal Arbitration Act ("FAA") and not by New Jersey procedural law. The FAA applies to all actions affecting commerce. See *Citizens Bank v. Alafabco, Inc., et al.,* 539 U.S. 52 (2003). The arguments made by the Class that this case is somehow an intra-New Jersey matter cannot be accepted. Although the members of the class are New Jersey physicians and health care providers, Oxford's operations including its payment processing and other aspects of its business are located in other states and are not all located in New Jersey. Moreover, the previous awards in this case have been referred to the Federal court in New Jersey for confirmation and an appeal from that court was taken to the United States Court of Appeals for the Third Circuit.

I also agree with Oxford that the ruling of the Supreme Court in *Stolt-Nielsen* should be given retroactive effect. I consider Oxford's motion in this case for reconsideration under the possible retroactive effect of *Stolt-Nielsen* on my prior ruling to be proper. It is accordingly necessary to proceed to the merits of Oxford's motion.

Oxford attacks the Clause Construction Award in this case on several grounds. First it says that because the Award concluded that the arbitration clause was unambiguous and silent on the issue of class arbitration, under *Stolt-Nielsen* there can only be one conclusion: the parties did not agree to authorize class arbitration. Second, Oxford says that the Award suggested that the broad scope of the arbitration clause, contrary to *Stolt-*

Nielsen, implied an agreement by the parties to authorize class arbitration. Third, it says that the Award inferred agreement by the parties to authorize class arbitration due to the lack of a carve-out or prohibition of class proceedings, reasoning that has been expressly rejected by *Stolt-Nielsen*.

The *Stolt-Nielsen* court viewed the central inquiry to be "whether the parties agreed to authorize class arbitration." Moreover, the Supreme Court provided the following directives: 1) a clause that is unambiguous and silent on the issue of class arbitration can lead to "only one possible outcome"—a ruling that the parties did not agree to authorize class arbitration; 2) the substantive breath and 3) the lack of an express prohibition on class arbitration cannot be used to infer an implicit agreement between the parties to authorize class arbitration.

For several reasons, however, the *Stolt-Nielsen* case is not applicable to the determination previously made in this arbitration.

The facts of the *Stolt-Nielsen* arbitration are very different from those presented in this arbitration. The arbitrators in *Stolt-Nielsen* had decided to proceed with class arbitration not on the basis of clause construction but essentially for reasons of public policy and in reliance on determinations made in other arbitral awards. The Supreme Court specifically noted that the panel's reliance on these arbitration determinations confirmed that their award was not based on a finding of the parties' intent.

By contrast, the determination in this arbitration involved no such adventures into public policy but was rather concerned solely with the parties' intent as evidenced by the words of the arbitration clause itself.

In the *Stolt-Nielson* case, the Supreme Court found that the arbitrators had no reason to "ascertain the parties intent, because the parties had stipulated that they were in complete agreement regarding their intent." The parties had stipulated that their agreement was "silent on whether [it] permitted or precluded class arbitration," but that the agreement was not ambiguous so as to call for parole evidence. The Supreme Court said that the stipulation of the parties left no room for inquiry by the arbitrators regarding the parties' intent, and any inquiry into that settled question would have been outside the panel's assigned task.

By contrast, the parties in this arbitration had entered into no such stipulation of agreement. It was accordingly necessary to determine what the intent of the parties was. I found that the arbitration clause unambiguously evinced an intention to allow class arbitration, indeed to require it.

Finally, this case differs from *Stolt-Nielsen* because of its procedural history prior to the arbitration. The claimant in this case actually started a class-action in the New Jersey state court. At the time it was one of many such class actions throughout the United States brought by medical providers against insurance companies, such as Oxford. So far as I know, all of the rest of those cases were consolidated by the multidistrict panel and eventually tried in the United States District Court for the Southern District of Florida. An appeal from the class determinations made by the court is referred to in the class certification award in this case. Dr. Sutter's case was unique among all of those others in that Oxford had inserted into its provider agreement the arbitration clause that was subject to the earlier proceedings.

By invoking the arbitration clause in this case, Oxford succeeded in obtaining an order from the New Jersey Court staying the class-action and referring Dr. Sutter's case to arbitration.

It seems to me that the foregoing matters are sufficient to distinguish this case from *Stolt-Nielsen.* I do not believe that the ruling in that case is controlling here. Even if it were, however, I believe that the Clause Construction Award would withstand *Stolt-Nielsen* scrutiny.

Oxford's first contention is that the arbitration clause in this case was unambiguous and silent on the issue of class arbitration, from which Oxford draws the conclusion that the parties cannot have authorized class arbitration. Oxford is wrong on this issue for several reasons.

Stolt-Ni[elsen] reaffirmed the bedrock proposition that the FAA was designed to place arbitration agreements on the same footing as other contracts. Thus, one would construe an arbitration clause in the same way as one would treat any other contractual provision. Oxford argues that since the clause in this case does not explicitly mention class action, the inquiry under the teaching of *Stolt-Nielson* is at an end. Oxford misinterprets both the holding in *Stolt-Nielson* and the words of its own arbitration clause.

First, the crucial fact in *Stolt-Nielson* was the parties' stipulation that the arbitration clause was silent with respect to class arbitration. There had been no meeting of minds on that point and hence no agreement as to class arbitration. There was nothing of the parties' intent for the arbitrators to discover and enforce. The parties themselves had stipulated that there was no intent regarding class arbitration. Since the Court went on to hold that where there is an absence of such intent to have class arbitration, agreement to have class arbitration cannot be inferred, and the determination of the arbitrators could not have been correct or within their powers.

This case could not be more different. There was no stipulation. The issue of the meaning of the arbitration clause and what the parties intended by it came to the arbitrator *de novo*. It was necessary to construe the arbitration clause in the ordinary way to glean the parties' intent. It was not futile, as it would have been in *Stolt-Nielson*, in the face of the parties' stipulation. It was rather a vital exercise to determine what the parties intended by the clause regarding class arbitration. The Court in *Stolt-Nielsen* said that it had no occasion to decide what contractual basis might support a finding that the parties agreed to authorize class action arbitration.

Second, Oxford simply announces that the clause is unambiguous and silent as to class arbitration. However, that conclusion is not for Oxford to make. It is rather for the arbitrator, under *Greentree*, *Stolt-Nielson* itself, and the specific order of the New Jersey court that sent this case to arbitration.

Even assuming that *Stolt-Nielsen* stands for the proposition that under the FAA, a class action arbitration can be maintained only if the arbitration clause authorizes such action, Oxford's argument still fails.

The arbitration clause in this case is as follows:

> No civil action concerning any dispute arising under this agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New

Jersey, pursuant to the Rules of the American Arbitration Association with one arbitrator.

The arbitration clause speaks of "no civil action." No civil action, in my view, means no civil action, of any form whatsoever. Since a class action is a form of civil action, the clause can be paraphrased: "No class action concerning any dispute arising under this agreement shall be instituted before any court, and all such disputes shall be submitted ... to ... arbitration." "No civil action" simply cannot, as a matter of English, be read to exclude any particular civil proceeding, including a class action, from its coverage.

Therefore, the text of the clause itself authorizes, indeed requires, class-action arbitration.

Oxford argues that the Clause Construction Award relied on absence of specific exclusion of class-action arbitration from this clause to indicate that it was the intention of the parties to include class arbitration[.] If true, this reasoning would run afoul of *Stolt-Nielsen*. However, the Clause Construction Award was not based on such reasoning. The absence of such an exclusion was not something that had to be to be relied on to divine the meaning of the clause. It merely corroborated what was already obvious from the language of the clause itself. "All" means all. As noted in the Clause Construction Award, if it had been the parties' intention to exclude class actions from the clause, in the face of such sweeping language, normal drafting would have suggested a specific exclusion. Similarly, noting that the clause is extraordinarily broad is corroborative of the construction noted above, but not essential to it.

Finally, if there were any doubt about what Oxford itself understood the clause to mean, its actions during the earlier court proceedings speak volumes. Dr. Sutter started a class action, not in arbitration but in court. Oxford itself moved in court successfully to invoke the arbitration clause to force Dr. Sutter's court case into arbitration. Under Oxford's own reading of the clause, it not only authorized a class action in arbitration, it required this particular class action to be sent to arbitration.

I find that there are two consequences from this. First, I think Oxford is judicially estopped from claiming that this case cannot proceed in arbitration as a class action. There is nothing in the *Stolt-Nielsen* case that would support a contrary interpretation. Second, Oxford's actions clearly demonstrate its own construction of its own clause.[2]

Oxford places considerable reliance on the briefing of the parties in connection with the Clause Construction Award. It uses various assertions to try to draw this clause into the cone of silence that *Stolt-Nielsen* suggests obviate intention of the parties to have class arbitration. It claims that parties' briefing made clear there had been no agreement reached on the issue of class arbitration. See Oxford's brief in support, footnote 16, quoting extensively from such sources. For, example, "Dr. Sutter does not point to any contract term that reasonably could be interpreted to provide for 'class arbitration,' or any evidence suggesting the parties intended to permit class arbitration."

---

[2] The Clause Construction Award did not find it necessary to deal with the *contra proferentem* arguments raised by Claimants. However, it is obvious that Oxford drafted the arbitration clause; it was not a negotiated clause. Accordingly, it would be construed against Oxford. Oxford's original interpretation of what the clause means is consistent with this construction and must be considered highly persuasive, if not conclusive.

These arguments, ingenious as they are, all founder on two immovable positions: First, Oxford persuaded the New Jersey court, using exactly the opposite argument made here, that Dr. Sutter's class action in court was required by the clause in question to be sent to arbitration.

Under Oxford's reading of the application of *Stolt-Nielsen* to this case, if the clause cannot permit Dr. Sutter's court class action to go to arbitration, then Dr. Sutter's original class action must be outside of the arbitration agreement altogether. Oxford would have to have misled the New Jersey court, and the court class action should be reinstated. This is another way of describing why Oxford should be judicially estopped from advancing this argument.

The second position is that the clause is not at all silent: It plainly says "No civil action ... and all (emphasis supplied) such disputes" are to go to arbitration. It was my task to construe that clause. "All," I found, and would find again, means all, without exception, the entire universe of actions that could possibly have been brought in any court, necessarily including class actions. This is, after all, Oxford's own clause, and we have Oxford's own interpretation of what its clause meant when it used it to require Dr. Sutter to bring this case in arbitration, when he very much wanted to be in court all along. Oxford quotes its own reply brief in the Clause Construction proceeding:

> "If large-scale class action disputes had in fact been contemplated, it is likely the parties ... would have opted for the courts, which have a well-developed body of procedural and substantive law to deal with class actions. Nothing of that sort was provided for in the contract."

Being in court, however, was what Dr. Sutter attempted; arbitration is where Oxford put him, using this clause.

In sum, we know what the clause plainly means and we know that in 2002, Oxford successfully persuaded a court of that same plain meaning.

For these reasons, I conclude that this case is distinguishable on the facts from the *Stolt-Nielsen* case and is not controlled by it. Moreover, even if *Stolt-Nielsen* applied, the result would be the same because the parties' intent to have class arbitration is clear. Finally, Oxford's own construction of its own clause makes the arguments it advances here untenable; that alone would put this case outside the contemplation of *Stolt-Nielsen*.

On reconsideration, accordingly, I find that the Clause Construction Award of 2003 was and remains correct.

Oxford's motion is denied.

/s/ W.L.D. Barrett
W.L.D. Barrett, Arbitrator

PETITIONER'S BRIEF

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No. 12-135

IN THE

Supreme Court of the United States

OXFORD HEALTH PLANS LLC,
Petitioner,
v.
JOHN IVAN SUTTER, M.D.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

In *Stolt-Nielsen S.A.* v. *AnimalFeeds International Corp.*, 130 S. Ct. 1758, 1775 (2010), this Court made clear that "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to arbitration." In this case, an arbitrator concluded that the parties affirmatively consented to class arbitration on the basis of a contract provision stating: "No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration." The question presented is:

Whether an arbitrator exceeds his powers under the Federal Arbitration Act by determining that parties affirmatively "*agreed to authorize* class arbitration," *Stolt-Nielsen*, 130 S. Ct. at 1776, based solely on their use of broad contractual language precluding litigation and requiring arbitration of any dispute arising under their contract.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 675 F.3d 215. The opinion of the district court (Pet. App. 19a-30a) is unpublished, but is available at 2011 WL 734933. The opinion of the arbitrator (Pet. App. 31a-53a) is unreported. A prior opinion of the court of appeals (Pet. App. 55a-59a) is unpublished, but is available at 227 F. App'x 135. Prior opinions of the district court (Pet. App. 61a-77a) and the arbitrator (Pet. App. 79a-85a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 3, 2012. A petition for rehearing en banc was denied on April 30, 2012. Pet. App. 87a-88a. The petition for a writ of certiorari was filed on July 27, 2012, and granted on December 7, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The provisions of Chapter 1 of the Federal Arbitration Act, 9 U.S.C. §§ 1-16, are set forth as an appendix to this brief.

STATEMENT

1. In 1998, petitioner Oxford Health Plans (through a subsidiary) entered into a professional services contract with respondent John Sutter, a physician. In exchange for preferred access to Oxford's network of members, Dr. Sutter agreed to provide health care services to those members at prescribed reimbursement rates. Pet. App. 92a; JA 11.

Oxford and Sutter also agreed, as part of their business relationship, to arbitrate any dispute that might arise under the parties' contract. Their arbitration clause provides, in its entirety:

> No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association with one arbitrator. All costs and expenses of the arbitration, including actual attorney's fees, shall be allocated among the parties to this Agreement according

> to the arbitrator's discretion. The arbitrator's award may be confirmed and entered as a final judgment in any court of competent jurisdiction and enforced accordingly. Proceeding to arbitration and obtaining an award thereunder shall be a condition precedent to the bringing or maintaining of any action in any court with respect to any dispute arising under this Agreement, except for the institution of a civil action to maintain the status quo during the pendency of any arbitration proceeding.

Pet. App. 93a-94a. Nothing in the agreement refers to arbitration by or on behalf of a class, and there is no other evidence that the parties ever discussed or contemplated the possibility of class proceedings.

In 2002, a dispute arose between the parties over reimbursement for Dr. Sutter's professional services. Despite the arbitration agreement, Sutter filed a complaint in New Jersey Superior Court, seeking to represent both himself and a putative class of "healthcare providers throughout the State of New Jersey ... who render or have rendered medical services to patients who are members of healthcare plans sponsored by defendants[.]" C.A. App. 155-156. The suit alleged breach of contract and other common law and statutory claims under New Jersey law, all relating to whether Oxford had improperly denied, reduced, or delayed reimbursements to Dr. Sutter and other New Jersey physicians who had contracts with Oxford. Pet. App. 2a; *see also* C.A. App. 155-156. Oxford moved to compel arbitration under the terms of its agreement with Sutter, while Sutter moved to certify a plaintiff class. The state court granted Oxford's motion, leaving all other issues to the arbitrator. Pet. App. 2a-3a; JA 25-26.

2. a. Before the arbitrator, the parties disputed whether their contract authorized class arbitration. The arbitrator deferred determination of that issue pending this Court's decision in *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003), which presented the question whether the FAA permitted enforcement of a state-law rule that allowed class arbitration if the parties' contract was silent on that issue, *id.* at 447. The arbitrator observed that, at the time, "[i]t was widely supposed that the Supreme Court would rule, as some lower Federal Courts had, that the Federal Arbitration Act does not allow class actions in arbitration unless the parties have specifically agreed to class action arbitration." Pet. App. 45a.

In the end, *Bazzle* did not address that question. Instead, a plurality concluded that the arbitrator in the case should have decided, in the first instance, whether the agreement was truly "silent" on the question of class arbitration. *See* 539 U.S. at 447. After that decision, the parties in this matter agreed that the proper next step would likewise be for the arbitrator to consider, in the first instance, whether their agreement authorized class arbitration. Pet. App. 45a.

In an order dated September 23, 2003, the arbitrator decided that the agreement authorized class proceedings. Pet. App. 43a-53a. He acknowledged that the text did not expressly address the issue, *id.* at 45a-46a, and he did not point to any other evidence that the parties ever discussed or came to any meeting of the minds about it, *see id.* at 45a-52a. Nonetheless, he concluded that "on its face, the arbitration clause ... expresses the parties' intent that class action arbitration can be maintained." *Id.* at 48a.

The arbitrator reasoned that this Court's decision in *Bazzle* had "firmly rejected" the view that there was any "blanket prohibition on arbitration class actions without specific authorization in the arbitration clause." Pet. App. 45a. Starting from that premise, he expressed the view that the clause here was "much broader even than the usual broad arbitration clause," prohibiting "any conceivable court action" and instead sending "all such disputes" to arbitration. *Id.* at 47a. He concluded that the "intent of the clause, read as a whole" was "to vest in the arbitration process everything that is prohibited from the court process." *Id.* Because "[a] class action is plainly one of the possible forms of civil action that could be brought in a court," the clause "must have been intended to authorize class actions in arbitration." *Id.* at 48a. "Accordingly, ... on its face, the arbitration clause in the Agreement expresses the parties' intent that class action arbitration can be maintained." *Id.*

Looking beyond the arbitration clause itself, the arbitrator also reasoned that if Dr. Sutter had agreed to arbitrate any dispute under his contract with Oxford, but the arbitration clause did not authorize class proceedings, then Dr. Sutter would not be able to pursue a class action in any forum. Pet. App. 48a. In the arbitrator's view, "that reading [could not] be inferred in the absence of a clear expression that such a bizarre result was intended." *Id.* In other words, "to avoid a finding" that the parties intended to authorize class actions in arbitration, "it would be necessary for there to be an express exception for class actions in the prohibition" on court actions—*i.e.*, the clause would have to permit class actions in court. *Id.* Similarly, the arbitrator "note[d]" that because "Oxford successfully invoked the arbitration clause to prohibit a class action in court, it ought to be [precluded] by judicial estoppel from arguing in th[e] arbitration" that the clause did not allow for class proceedings. *Id.*

b. The arbitrator's ruling on clause construction left questions of class certification for a later date. Pet. App. 52a. After further proceedings, the arbitrator certified a plaintiff class in March, 2005. *Id.* at 79a-84a; JA 38-55. Sutter asserts that the class includes as many as 20,000 New Jersey physicians who, over an eight-year period, signed provider agreements with Oxford containing arbitration clauses with language the same as "or similar to" that in Dr. Sutter's contract. Pet. App. 82a.

In accordance with the AAA's Supplementary Rules for Class Arbitrations—issued shortly after the arbitrator's 2003 clause construction ruling—the arbitrator's class certification ruling was set out in a partial final "class determination" award, which attached and incorporated the arbitrator's original "clause construction" award. *See* Pet. App. 79a, 85a. Oxford asked the United States District Court for the District of New Jersey to vacate both rulings, as contemplated by Rule 5 of the AAA Supplementary Rules. *See id.* at 97a-98a. The court denied the motion to vacate. *Id.* at 61a. Oxford appealed the class certification ruling (but not the underlying clause construction ruling), and the court of appeals affirmed. *Id.* at 55a-59a. The arbitration has since proceeded on a class basis. Oxford denies both Sutter's allegations that Oxford breached its contract with him and his suggestion that purportedly common practices improperly reduced payments to thousands of members of the physician class.[1]

3. In April 2010, this Court decided *Stolt-Nielsen S.A.* v. *AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010). There, the parties to a commercial contract contested whether their broad arbitration clause should be construed to permit class arbitration, while "stipulat[ing]" that the clause was "silent" on the issue—meaning not just that there was no express reference to class arbitration, but that the parties had never reached any agreement on the question, one way or the other. *See id.* at 1766, 1768-1770 & nn.6-7. An arbitration panel concluded that class proceedings were permissible under such a silent agreement, because the record "did not 'establish that the parties ... intended to *preclude* class arbitration.'" *Id.* at 1775 (quoting arbitration award). This Court rejected that reasoning as "fundamentally at war with the foundational FAA principle that arbitration is a matter of consent." *Id.* Instead, the Court held, the FAA rule is exactly the reverse: "[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* Furthermore, such an agreement "is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate." *Id.* Because the parties had conceded the absence of any actual agreement, neither party could be "compelled to submit the[] dispute to class arbitration." *Id.* at 1776.

Oxford asked the arbitrator here to reconsider his clause construction award in light of *Stolt-Nielsen*. Pet.

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[1] Before certiorari was granted, a final award was not expected until sometime in 2014. *See* Pet. 6. & n.3. Following the grant of review, proceedings in the arbitration were stayed.

App. 4a. It contended that here, as in *Stolt-Nielsen*, the parties had agreed to arbitrate all disputes but had not expressly or implicitly agreed to permit class arbitration. In an order dated July 6, 2010, again attaching and incorporating the initial clause construction award, the arbitrator considered *Stolt-Nielsen* but adhered to his original decision. *Id.* at 31a-32a. In his view, "the crucial fact in *Stolt-Nielsen* was the parties' stipulation that the arbitration clause was silent with respect to class arbitration." *Id.* at 37a. Because there had been "no meeting of the minds on that point and hence no agreement," there was "nothing of the parties' intent for the arbitrators to discover and enforce." *Id.* This case, the arbitrator maintained, "could not be more different," because he had engaged in "a vital exercise to determine what the parties intended by the[ir arbitration] clause regarding class arbitration." *Id.* at 38a.

Quoting the language of the clause—"No civil action concerning any dispute arising under this agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration"—the arbitrator concluded that a class action could proceed in arbitration because "a class action is a form of civil action." Pet. App. 38a-39a. Because the clause prohibits bringing a class action in court, while directing all "disputes" under the agreement to arbitration, he reasoned that those "disputes" must include "the entire universe of actions that could possibly have been brought in any court, necessarily including class actions." *Id.* at 41a. He concluded that "the parties' intent to have class arbitration [was] clear," *id.* at 42a, because "the text of the clause itself authorizes, indeed requires, class-action arbitration," *id.* at 39a.

The arbitrator further sought to distinguish *Stolt-Nielsen* on the ground that the arbitrators there exceeded their powers by construing an arbitration clause to permit class proceedings "essentially for reasons of public policy." Pet. App. 35a; *see Stolt-Nielsen*, 130 S. Ct. at 1768-1770. He maintained that in this case he was always "concerned solely with the parties' intent as evidenced by the words of the arbitration clause itself." Pet. App. 35a.

The arbitrator retreated from his previous reliance (Pet. App. 48a) on the lack of any specific *exclusion* of class arbitration, conceding that such reasoning "would run afoul of Stolt-Nielsen" (*id.* at 39a). He now suggested that "[t]he absence of such an exclusion ... merely corroborated what was already obvious from the language of the clause itself." *Id.* He continued, however, to emphasize that if class arbitration were not available, Dr. Sutter would not be able to maintain a class action at all. *See id.* at 41a-42a. He remained unwilling to accept that result, which he had previously called "bizarre" (*id.* at 48a). *See, e.g., id.* at 41a ("[I]f the clause cannot permit Dr. Sutter's court class action to go to arbitration, then Dr. Sutter's original class action must be outside of the arbitration agreement altogether[,] ... and the court class action should be reinstated."). Similarly, the arbitrator repeated his conclusion that because Oxford had "moved in court successfully to invoke the arbitration clause" in its agreement with Dr. Sutter, it was now "judicially estopped from claiming that this case cannot proceed in arbitration as a class action." *Id.* at 40a.

4. Oxford asked the district court to vacate the arbitrator's reconsidered clause construction award under Section 10 of the FAA, 9 U.S.C. § 10. In February 2011, the court denied Oxford's motion and granted Sutter's cross-motion to confirm the award. Pet. App. 19a-20a. In reaching that conclusion, the court stressed

the "highly deferential standard of review under the FAA." *Id.* at 27a. Noting that this Court in *Stolt-Nielsen* "expressly declined 'to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration,'" the court reasoned that the arbitrator had "concluded that the contractual basis between these parties, i.e. their arbitration agreement, clearly and unambiguously expressed their intent to authorize class action arbitration[.]" *Id.* at 28a. Thus, the award would be confirmed because the arbitrator's decision "suggests that [he] performed the appropriate function of an arbitrator under the FAA after *Stolt-Nielsen*; [he] examined the parties' intent, and gave effect to the arbitration agreement." *Id.* at 28a-29a.

5. The court of appeals affirmed. Pet. App. 1a-18a. It acknowledged that, under *Stolt-Nielsen*, "[a]n arbitrator may exceed his powers by ordering class arbitration ... unless there is a contractual basis for concluding that the parties agreed to that procedure." *Id.* at 8a; *see also id.* at 8a-12a. But it rejected Oxford's contention that the arbitration clause at issue in this case is just as "silent" as the clause at issue in *Stolt-Nielsen*. *Id.* at 13a. The court reasoned that in this case, unlike in *Stolt-Nielsen*, "[n]o stipulation between Oxford and Sutter is conclusive of the parties' intent." *Id.* The court then deferred to the arbitrator's decision to permit class proceedings, on the ground that the arbitrator "articulate[d] a contractual basis for his decision," and Oxford could not point to a "conclusive statement of the parties' intent" to the contrary. *Id.* at 14a-15a.

In reaching that conclusion, the court summarized the arbitrator's textual analysis:

> He reasoned that the clause's first phrase, "No civil action concerning any dispute arising under this Agreement shall be instituted before any court," is broad enough to include class actions. Thus, its second phrase, "and all such disputes shall be submitted to final and binding arbitration ...," sends all conceivable civil actions—including class actions—to arbitration. In other words, the phrase "no civil action ... shall be instituted in any court" meant that a class action may not be instituted in a court of law. "All such disputes" must go to arbitration.

Pet. App. 14a.

Without endorsing, or even discussing, the soundness of this reasoning, the court accepted it as sufficient to establish contractual "intent" for purposes of *Stolt-Nielsen*. Pet. App. 14a-17a. The court rejected Oxford's arguments that the parties here had never reached any actual agreement as to class arbitration and "that the arbitrator improperly inferred the parties' intent to authorize class arbitration from the breadth of the parties' arbitration agreement and from its failure to preclude class arbitration." *Id.* at 16a. These, the court reasoned, were "simply dressed-up arguments that the arbitrator interpreted [the] agreement erroneously." *Id.* at 15a.

In sum, the court of appeals refused to provide any meaningful independent review of the "contractual basis" asserted by the arbitrator for finding that the parties "*agreed to authorize* class arbitration." 130 S. Ct. at 1776 & n.10. It was satisfied by the fact that the arbitrator had at least "articulate[d] a contractual basis for his decision" that the court considered not "totally irrational." Pet. App. 14a, 17a. In the court's view, "[n]othing more [was] required under § 10(a)(4) of the Federal Arbitration Act." *Id.* at 17a.

SUMMARY OF ARGUMENT

In *Stolt-Nielsen S.A.* v. *AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010), and *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740 (2011), this Court has made clear that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Stolt-Nielsen*, 130 S. Ct. at 1775. The Court has further held that consent to class arbitration may not be inferred from the parties' basic agreement to arbitrate or from the fact that an agreement does not *preclude* class proceedings. *Id.*

Here, the core of the parties' arbitration agreement provides only that "[n]o civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration[.]" Pet App. 93a. This language does not address the possibility of class proceedings in any way, and there is no other evidence to suggest that the parties ever discussed or contemplated, let alone agreed to authorize, class arbitration. Under *Stolt-Nielsen*, those simple observations should be enough to resolve most cases, including this one.

The arbitrator here purported to rest his imposition of class proceedings on a textual analysis of the parties' agreement, but his reasoning is unsustainable under any standard of review. The wording of the arbitration clause is wholly unremarkable, banning litigation of disputes in court and instead referring them to arbitration. What it sends to arbitration is "disputes," not "civil actions." In any event, a class action is not a special form of "civil action" but a procedural device, and *Stolt-Nielsen* specifically holds that parties do not authorize the use of class procedures simply by agreeing to arbitrate their disputes. 130 S. Ct. at 1775-1776. If anything, the text of the parties' agreement is inconsistent with any intent to authorize class procedures; but the Court need not address that question, because there is no plausible argument that the text provides any affirmative "contractual basis for concluding that the part[ies] *agreed*" to class arbitration. *Id.* at 1775.

Stolt-Nielsen arguably leaves open the possibility that affirmative agreement to class arbitration might sometimes be shown by evidence beyond the text of an arbitration clause. Here, however, there is no extrinsic evidence of any intent to authorize class arbitration—no parol evidence concerning the parties' negotiations, no course of conduct or evidence of industry practice, no clear state default rule against which the parties might be shown to have contracted. And after *Stolt-Nielsen*, there is no room in this context for extra-textual analysis that, while framed in contractual terms, in fact is based on an adjudicator's (or even local law's) view of a desirable policy result. On the record here, such a policy preference provides the most apparent explanation for the arbitrator's decision. *Stolt-Nielsen* makes quite clear, however, that an arbitrator "exceed[s his] powers," 9 U.S.C. § 10(a)(4), if he seeks to impose class arbitration on any such basis.

In refusing to vacate the arbitrator's decision, the court of appeals did not consider whether his contractual reasoning was correct, or even plausible. It concluded that, on FAA review, it was enough that the arbitrator had "articulated" a "contractual basis" for his imposition of class arbitration. As this Court observed in *Stolt-Nielsen*, however, "merely saying something is so does not make it so." 130 S. Ct. at 1769 n.7. Accepting any "contractual basis" that an arbitrator can "articulate" would leave parties and courts powerless to enforce *Stolt-Nielsen*'s holding that an arbitrator lacks the power to conduct a class arbitration absent the parties' affirmative consent.

While arbitrators are accorded wide authority to adjudicate questions that are properly submitted to them, courts play a vital role in ensuring that arbitrators stay within the scope of their mandates. The promise of this independent judicial check on *ultra vires* action by arbitrators is essential to provide contracting parties with the confidence to entrust their disputes to arbitration in the first place—a fundamental goal of the FAA. *Stolt-Nielsen* makes clear that the judicial role in policing the limits on arbitral power extends not only to what issues parties have agreed to arbitrate, but to *with whom*—including in particular whether they have authorized class arbitration. Indeed, judicial oversight is especially critical in this context, both because of the fundamental differences this Court has recognized between ordinary bilateral arbitration and class proceedings and because policy views or financial interests may make it difficult for arbitrators to remain wholly impartial in deciding the class issue.

In short, courts must stand ready to vacate arbitral awards that would impose class arbitration without a proper contractual basis—even given the normally "high hurdle" of FAA review. *See Stolt-Nielsen*, 130 S. Ct. at 1767. Here, the arbitrator's contractual analysis is so plainly inadequate that it cannot be sustained under any meaningful standard of review.

ARGUMENT

I. THE FEDERAL ARBITRATION ACT PERMITS CLASS ARBITRATION ONLY IF THE PARTIES HAVE AFFIRMATIVELY AGREED TO AUTHORIZE IT

The arbitrator here required Oxford to submit to class arbitration proceedings based on nothing more than a broadly worded arbitration clause requiring arbitration (and precluding litigation) of any dispute arising under the parties' contract. But this Court has twice held that a party may not be forced into class arbitration without its affirmative consent—and that class proceedings are so inconsistent with the ordinary understanding of arbitration that consent to use them may not be inferred from the agreement to arbitrate itself.

In *Stolt-Nielsen S.A.* v. *AnimalFeeds International Corp.*, 130 S. Ct. 1758, 1775 (2010), the Court held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." And in *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1752-1753 (2011), the Court reaffirmed that, in light of the fundamental differences between class arbitration and "arbitration as envisioned by the FAA," a party to an arbitration agreement "may not be required" to submit to class proceedings against its will. These basic principles control the outcome of any case, like this one, in which neither the text of the parties' agreement nor any extrinsic evidence provides a basis for concluding that the parties ever agreed to class arbitration.

a. *Stolt-Nielsen* considered "whether imposing class arbitration on parties whose arbitration clauses are 'silent' on that issue is consistent with the [FAA]," 130 S. Ct. at 1764—a question left open by this Court's plurality decision in *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003). *Stolt-Nielsen* involved an arbitration clause requiring "[a]ny dispute arising from the making, performance or termination" of a commercial contract to be resolved by arbitration. 130 S. Ct. at 1765. When a dispute arose, the claimant filed a putative class action in federal court. *Id.* After a series of court rulings, the dispute entered arbitration. *Id.* In a supplemental agreement, the parties agreed that the arbitration panel would decide whether their original agreement authorized class arbitration. *Id.*

Before the panel, the parties actively contested whether their broad arbitration clause should be construed to permit class arbitration. In doing so, however, they "stipulated" that the clause itself was "silent" on the issue. *See* 130 S. Ct. at 1766. According to plaintiff's counsel, "silence" meant more than that the clause made no "express reference" to the availability of class procedures. *Id.* Rather, the "stipulation" meant that "neither the language of the contract nor any other evidence established that the parties had reached any agreement on the issue of class arbitration[.]" *Id.* at 1770; *see also id.* at 1766, 1768-1770 & nn.6-7. The question for the arbitration panel was therefore whether class proceedings were available in the absence of any such agreement.

The panel concluded that the clause should be interpreted to permit class proceedings. It reasoned, for example, that the evidence did not prove an intent to *preclude* class arbitration, and that the defendants' position "would leave 'no basis for a class action'" at all. 130 S. Ct. at 1766, 1769 n.7; *compare* Pet. App. 48a. In addition, the panel pointed to a number of post-*Bazzle* arbitration decisions that had allowed class treatment under a "wide variety of clauses." 130 S. Ct. at 1766.

This Court held that the arbitrators' ruling "exceeded their powers" within the meaning of the judicial review provision of the FAA, 9 U.S.C. § 10(a)(4). The Court fully recognized the "high hurdle" faced by a party seeking vacatur of an arbitrator's decision, 130 S. Ct. at 1767, and that "the interpretation of an arbitration agreement is generally a matter of state law," *id.* at 1773. The Court also made clear, however, that "the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'" *Id.* As a consequence, "parties are 'generally free to structure their arbitration agreements as they see fit,'" including "to limit the issues arbitrated," to choose the "rules under which an arbitration will proceed," and in particular to "specify *with whom* they choose to arbitrate their disputes." *Id.* at 1774. The duty of courts and arbitrators in such cases is simple: "to give effect to the intent of the parties." *Id.* at 1775.

From these principles, the Court explained, "it follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." 130 S. Ct. at 1775; *see also id.* at 1776 ("[C]onsistent with our precedents emphasizing the consensual basis of arbitration, we see the question as being whether the parties *agreed to authorize* class arbitration."). In particular, the Court rejected the arbitrators' reliance on an absence of evidence to "'establish that the parties ... intended to *preclude* class arbitration.'" *Id.* at 1775 (quoting arbitration award). To the contrary, the Court cautioned, the FAA required an affirmative showing of consent to class proceedings, based on more than just the existence of the agreement to arbitrate itself:

> An implicit agreement to authorize class-action arbitration ... is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate. This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.

Id. at 1775.

The Court explained that imposing class proceedings on non-consenting parties violates the FAA by disrupting the parties' basic agreement. Traditional arbitration embodies a trade-off in which "parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." 130 S. Ct. at 1775. In contrast, "the relative benefits of class-action arbitration are much less assured, giving reason to doubt the parties' mutual consent to resolve disputes through class-wide arbitration." *Id.* at 1775-1776. For example, an arbitrator may be called upon to resolve not just a single dispute between contracting parties, but "many disputes between hundreds or perhaps even thousands of parties." *Id.* at 1776. His award must purport to "adjudicate[] the rights of absent parties." *Id.* At the same time, defendants lose the protection of full appellate review, on the premise that they agreed to accept the generally "much more limited" scope of judicial review of arbitration awards on the merits. *Id.* As the Court concluded:

"We think that the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." *Id.*

In *Stolt-Nielsen*, the parties had stipulated that they never reached any actual agreement with respect to class arbitration. *E.g.*, 130 S. Ct. at 1766, 1770, 1776. The arbitration panel's decision was therefore "fundamentally at war with the foundational FAA principle that arbitration is a matter of consent." *Id.* at 1775. Indeed, there could be only "one possible outcome." *Id.* at 1770. "[W]here the parties stipulated that there was 'no agreement' on this question, it follows that the parties cannot be compelled to submit their dispute to class arbitration." *Id.* at 1776. And because both parties had acknowledged that their contract was silent on the issue, the Court had "no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration." *Id.* at 1776 n.10.

b. The Court reinforced these points in *Concepcion*, which held that "the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." 131 S. Ct. at 1744. Specifically, the FAA preempted a state-law rule classifying certain express waivers of any right to class arbitration as unconscionable and, therefore, unenforceable. *See id.* at 1746. As the Court explained, "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 1748.

The state rule at issue made class arbitration "manufactured ... rather than consensual." 131 S. Ct. at 1751. Invoking ***Stolt-Nielsen***, the Court held that the change from individual to class proceedings was too "fundamental" to permit that result. *Id.* at 1750.

> Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties.

Id. In fact, class arbitration requires parties to forgo the "principal advantage" of arbitration, its informality. *Id.* at 1751. Entertaining class claims "makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.*

In addition, the Court observed that it remains uncertain whether class arbitration can either protect the rights of absent class members or bind them in matters resolved in favor of the defendant. 131 S. Ct. at 1751. At the same time, class arbitration "greatly increases risks to defendants," while essentially eliminating appellate review of errors of fact or law. *Id.* at 1752. In light of these limitations, the Court expressed frank skepticism that any defendant would ever agree to "bet the company with no effective means of review." *Id.* And in the absence of such agreement, class arbitration "may not be *required* by state law." *Id.* at 1753. As the Court concluded, class arbitration simply "is not arbitration as envisioned by the FAA[.]" *Id.* (emphasis added).

In sum, this Court has twice made clear that class arbitration may not be imposed absent the affirmative agreement of all parties—and that such agreement may not be inferred from the agreement to arbitrate itself, or imposed on the parties by rules of law that conflict with the commands of the FAA. Any class arbitration must rest, instead, on a distinct and sound "contractual basis." *Stolt-Nielsen*, 130 S. Ct. at 1775. If it does not, it violates the fundamental FAA precept that "arbitration 'is a matter of consent, not coercion.'" *Id.* at 1773.

II. THERE IS NO CONTRACTUAL BASIS FOR CLASS ARBITRATION IN THIS CASE

In this case, there is no plausible argument that the parties ever affirmatively agreed to permit class arbitration. Nothing in the text of the parties' arbitration clause refers in any way to class proceedings, and no extrinsic evidence suggests any non-textual basis for finding an agreement to authorize class arbitration. The arbitrator's contrary ruling relies on nothing more than the existence of a broad agreement to arbitrate that bars litigation and includes no express *prohibition* on class arbitration. Under *Stolt-Nielsen*, that is plainly not enough.

A. There Is No Textual Basis For Class Arbitration

The arbitration clause here states in pertinent part:

> No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration[.]

Pet. App. 93a. On its face, this language does nothing more or less than one would expect of a typical broad arbitration agreement. It (1) prohibits Oxford and Sutter from litigating any dispute arising under their agreement in the courts, instead (2) sending all such disputes to arbitration. In light of *Stolt-Nielsen*'s clear holding that "[a]n implicit agreement to authorize class arbitration ... is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate," 130 S. Ct. at 1775, there should be no question that the text here provides no basis for imposing class arbitration.[2]

The arbitrator in this case nonetheless asserted that "the text of the [arbitration] clause itself authorizes, indeed requires, class-action arbitration." Pet. App. 39a. That assertion cannot withstand even minimal scrutiny.

1. The arbitrator first suggested that there is something "unique" about the breadth of the clause here that justifies interpreting it to allow class arbitration. Pet. App. 47a. But clauses requiring arbitration of "all disputes" or "any dispute" are commonplace. When parties to a contract seek to reduce the risk of future litigation burdens by agreeing to arbitrate disputes, they often seek to extend the benefits of that agreement broadly to "any" or "all" potential disputes. An "any dispute" clause thus reflects "standard" wording that is found, "in one form or another, in many arbi-

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[2] As the dissent in *Stolt-Nielsen* observed, "[t]he breadth of [an] arbitration clause, and the absence of any provision waiving or banning class proceedings," is not enough to permit arbitrators to order class arbitration. 130 S. Ct. at 1782 (Ginsburg, J., dissenting). Rather, *Stolt-Nielsen* "demands contractual language one can read as affirmatively authorizing class arbitration." *Id.*

tration agreements," and "[o]n its face ... merely reflects an agreement between the parties to arbitrate their disputes." *Reed* v. *Florida Metro. Univ., Inc.*, 681 F.3d 630, 642 (5th Cir. 2012) (citing sources). Form arbitration clauses drafted by leading arbitration organizations are of similar breadth. *See id.* (citing forms suggested by the AAA and JAMS). Indeed, the arbitration clause at issue in *Stolt-Nielsen* itself was an "any dispute" clause. *See* 130 S. Ct. at 1765.

2. The arbitrator also remarked on the two-part structure of the clause at issue here—barring civil actions in court with the first breath, and sending any dispute to arbitration with the second. *E.g.*, Pet. App. 47a-48a. But that structure is not remarkable, let alone "unique" (*id.* at 47a). To date, three federal appellate courts have considered the question presented in this case, and the clauses at issue in all three cases share the same basic two-part structure. In addition to the decision below, the Second Circuit in *Jock* v. *Sterling Jewelers Inc.* considered a clause in which the parties agreed to arbitrate "'any dispute, claim, or controversy ... which could have otherwise been brought before an appropriate government or administrative agency or in a[n] appropriate court,'" with the employee expressly "'waiving [her] right to commence any court action.'" 646 F.3d 114, 116-117 (2d Cir. 2011), *cert denied*, 132 S. Ct. 1742 (2012) (quoting contract). Likewise, in *Reed* the clause provided that "'[n]either [party] shall file or maintain any lawsuit in any court against the other,'" while also specifying that "'any dispute ... no matter how described, pleaded or styled, shall be resolved by binding arbitration.'" 681 F.3d at 632-633 (quoting contract).

By including an express prohibition on litigation, in addition to an "any disputes" arbitration provision, parties avoid any possible lack of clarity and ensure that the clause will be enforceable. For example, under New Jersey law at the time that Oxford and Sutter signed their agreement, an arbitration clause stating only that any dispute between the parties was to be arbitrated could have been held to provide insufficient notice that the agreement to arbitrate would override a general right to invoke judicial proceedings, especially as to statutory claims.[3] The two-part structure simply makes especially clear what the parties are waiving (court actions) and what they are permitting (arbitration). Nothing more.

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[3] *See, e.g.*, *Alamo Rent A Car, Inc.* v. *Galarza*, 703 A.2d 961, 966 (N.J. Super. Ct. App. Div. 1997) ("The 'any dispute' language is the very least an employer needs to utilize in order to guarantee arbitration of all disputes. The better course would be the use of language reflecting that the employee, in fact, knows that other options such as ... judicial remedies exist; [and] that the employee also knows that by signing the contract, those remedies are forever precluded[.]"); *Garfinkel* v. *Morristown Obstetrics & Gynecology Assocs., P.A.*, 773 A.2d 665, 672 (N.J. 2001); *Marchak* v. *Claridge Commons, Inc.*, 633 A.2d 531, 535 (N.J. 1993) ("A clause depriving a citizen of access to the courts should clearly state its purpose."); *see also Trumbull* v. *Century Mktg. Corp.*, 12 F. Supp. 2d 683, 687 (N.D. Ohio 1998) ("The language of the arbitration clause says nothing about arbitration of statutory claims ..., or about the significance of the right to a judicial forum .... [I]t cannot be concluded that there was a knowing waiver of the right to a judicial forum[.]"); Cal. Civ. Proc. Code § 1295(a) (certain medical service contracts must contain provision stating, "[i]t is understood that any dispute as to medical malpractice[] ... will be determined by submission to arbitration as provided by California law, and not by a lawsuit or resort to court process"); Volin, *Recent Legal Developments in the Arbitration of Employment Claims*, 52 Disp. Resol. J. 16, 21 (1997) (counseling employers to avoid "arguments" over enforceability of arbitration clauses by "expressly stating ... that the parties are waiving their right to a judge or jury trial").

3. The arbitrator also focused on language barring any "civil action concerning any dispute ... before any court" and referring "all such disputes" to arbitration. *E.g.*, Pet. App. 48a. According to the arbitrator, that language "must have been intended to authorize class actions in arbitration," because "[a] class action is plainly one of the possible forms of civil action." *Id.*; *see also id.* ("[A]ll that is prohibited by the first part of the clause is vested in arbitration by its second part[.]"); *id.* at 39a ("'No civil action' simply cannot, as a matter of English, be read to exclude any particular civil proceeding, including a class action, from its coverage.").

But the arbitration clause does not send all "civil actions" to arbitration. It prohibits all civil actions "concerning *any dispute*" arising under the parties' contract, and sends "all such *disputes*" to arbitration. Pet. App. 93a (emphasis added). This makes sense. A "civil action" is, by definition, a "judicial proceeding." *Black's Law Dictionary* 31 (8th ed. 2004); *cf. BP Am. Prod. Co.* v. *Burton*, 549 U.S. 84, 91 (2006) ("action" is "ordinarily used in connection with judicial, not administrative, proceedings"); Fed. R. Civ. P. 2. Arbitration is an alternative, streamlined, non-judicial method of resolving disputes. The parties' agreement has one natural reading: Any dispute arising under the agreement shall be submitted to arbitration, rather than being made the basis of a civil action in court.

Moreover, a class action is not a special "form[] of civil action" (Pet. App. 48a) or a "particular civil proceeding" (*id.* at 39a). It is a procedural device that is sometimes available to resolve multiple individual disputes at the same time. *See generally* Fed. R. Civ. P. 23; *Shady Grove Orthopedic Assocs. P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1439 (2010) (plurality opinion). It would be implausible to contend that the parties intended to preserve in arbitration all procedures potentially associated with civil actions in court. *Cf. Concepcion*, 131 S. Ct. at 1752-1753 ("Parties *could* agree to arbitrate pursuant to the Federal Rules of Civil Procedure, or pursuant to a discovery process rivaling that in litigation. ... But what the parties in the aforementioned examples would have agreed to is not arbitration as envisioned by the FAA[.]"). And while arbitrators have discretion to determine many of the procedures to be used in the conduct of an arbitration, *Stolt-Nielsen* squarely holds that class proceedings are not the type of procedure an arbitrator is authorized to impose without the specific authorization of the parties. 130 S. Ct. at 1775.

4. Finally, the arbitrator divined that the parties must have intended to authorize class arbitration because their agreement so completely prohibits suits in court. Pet. App. 47a ("[T]he disputes that the clause sends to arbitration are the same universal class of disputes the clause prohibits as civil actions before any court. It follows that the intent of the clause, read as a whole, is to vest in the arbitration process everything that is prohibited from the court process."). But it is irrational to conclude that parties who comprehensively barred court litigation in favor of arbitration "must have ... intended" to commit themselves to the possibility of protracted, uncertain, costly, and high-stakes class proceedings. *Id.* at 48a; *see Reed*, 681 F.3d at 643 ("[T]he central purpose of the arbitration agreement is to *avoid* ... provisions [such as a state statute permitting certain class actions], not to incorporate them into the arbitration agreement."); *cf. Concepcion*, 131 S. Ct. at 1748 ("Requiring the availability of classwide arbitration interferes with fundamental attributes of arbi-

tration and thus creates a scheme inconsistent with the FAA.").

5. If anything, the text of the parties' agreement is inconsistent with any intent to authorize class arbitration. For example, the arbitration clause refers to disputes arising under "this agreement"—*i.e.*, the agreement between Sutter and Oxford. Pet. App. 93a. It sends *those* disputes to arbitration, before a single arbitrator selected by the parties (in accordance with the AAA rules) to hear their particular dispute. *Id.* Here, Sutter wants the single arbitrator appointed to hear his dispute with Oxford to hear and resolve, at the same time, allegedly similar disputes involving as many as 20,000 other parties, each arising under its own separate professional services agreement. That is a fundamentally different proposition. *Cf. Bazzle*, 539 U.S. at 458-459 (Rehnquist, C.J., O'Connor, and Kennedy, JJ., dissenting) (provisions calling for parties to appoint one arbitrator to resolve "'disputes ... arising from ... *this* contract'" made "quite clear that petitioner must select, and each buyer must agree to, a particular arbitrator for disputes between petitioner and that specific buyer").[4]

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[4] Similarly, the agreement gives the arbitrator full discretion to allocate all costs of an arbitration, including attorneys' fees, among the parties. Pet. App. 93a. That provision makes sense in the context of an ordinary, bilateral arbitration of inherently limited scope, but would be quite surprising if its effect were to impose on either party potential liability for the arbitrator's fees, other costs, and attorneys' fees in a multi-year, multi-issue class arbitration involving thousands of parties. *Cf. Bazzle*, 539 U.S. at 459 (dissenting opinion) (arbitration defendant might choose different arbitrators for proceedings with different members of proposed class, "to avoid concentrating all of the risk of substantial damages awards in the hands of a single arbitrator"). The agreement also includes specific pre-arbitration grievance procedures

This Court need not address, however, whether the text of the parties' agreement should have been construed to exclude any possibility of class proceedings. After *Stolt-Nielsen*, the controlling point is that there is no plausible converse argument that the text reveals an *affirmative agreement* to *authorize* class arbitration. At most, the parties' arbitration clause is "silent" on the question in the *Stolt-Nielsen* sense. The clause does no more than require arbitration, rather than litigation, of "all ... disputes," Pet. App. 93a; and *Stolt-Nielsen* could not have been clearer that "it cannot be presumed the parties consented to [class arbitration] by simply agreeing to submit their disputes to an arbitrator." 130 S. Ct. at 1775. The text here cannot provide what *Stolt-Nielsen* demands: a specific "contractual basis for concluding that [a] party *agreed*" to class arbitration. *Id.*

B. There Is No Non-Textual Basis For Finding Consent To Class Proceedings

For most cases (including this one), the fact that the text of an arbitration clause does not address class arbitration will provide a straightforward answer to the question whether there is any "contractual basis" for ordering class proceedings. Arguably, *Stolt-Nielsen* leaves open the possibility that, in the absence of a stipulation that the parties never reached any meeting of the minds on the question, there may be circumstances in which a court or arbitrator may properly look beyond the text.[5] But even in those circumstances,

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that clearly contemplate only bilateral disputes. *See* JA 20; Pet. App. 50a-52a.

[5] *See* 130 S. Ct. at 1770 (stipulation left case in posture in which "neither the language of the contract *nor any other evidence* established that the parties had reached any agreement" (empha-

the question would still be whether "the *parties* … *reached any agreement* on the question of class arbitration." 130 S. Ct. at 1770 (emphasis added). The record in this case reveals no extra-textual basis for finding any such agreement.

1. One can imagine, for example, circumstances in which extrinsic evidence might show that the parties actually "reached an[] agreement on the question of class arbitration," 130 S. Ct. at 1770, although they failed to express it clearly in their written contract. There might be evidence of discussions that took place at the time of contracting, or of an accepted practice of using class arbitration in a particular field. But the arbitrator here never pointed to any such extrinsic evidence, and there is none that would support his decision.[6]

It is also possible that the law governing a particular contract might seek to impose a default rule that class arbitration would be deemed available unless excluded. Such a rule, if clearly established at the time of contracting and known to both parties (and if not preempted by the FAA under *Stolt-Nielsen* and *Concepcion*), might support an inference of actual agreement to class proceedings if the parties chose not to

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sis added)); *Concepcion*, 131 S. Ct. at 1750 (suggesting possibility of "some background principle of contract law that would affect [an agreement's] interpretation").

[6] On the contrary, Oxford and Sutter made their arbitration agreement in 1998, before most parties would reasonably have entertained any notion of class arbitration. As this Court noted in *Stolt-Nielsen*, 130 S. Ct. at 1768 n.4, testimony in that case revealed that class arbitrations were uncommon before this Court's 2003 decision in *Bazzle* and the ensuing adoption of the AAA supplementary rules.

contract around it. Again, however, the arbitrator here did not point to any such rule, nor could he have. The parties did not contract against the background of any special rule of New Jersey law addressing class arbitration.[7] And as to federal law, the prevailing rule in 1998 was that the FAA "forbids federal judges from ordering class arbitration where the parties' arbitration agreement is silent on the matter," because "to read such a term into the parties' agreement would 'disrupt the negotiated risk/benefit allocation and direct the parties to proceed with a different sort of arbitration.'" *Champ* v. *Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995) (brackets omitted).[8] Indeed, when the arbitrator first considered clause construction after this Court's 2003 decision in *Bazzle*, he remarked that it had been "widely supposed" that in that case this Court "would rule, as some lower Federal Courts had, that the Federal Arbitration Act does not allow class actions in arbitration unless the parties have specifically agreed to class action arbitration." Pet. App. 45a. If anything, then, the background rules in place at the time of contracting here cut strongly against any notion that the parties ever contemplated, let alone reached any meeting of the minds, that their arbitration agreement would authorize class proceedings.

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[7] The general New Jersey rule is that "[t]he law will not ... supply a term or condition with respect to which [a contract] is silent." *See, e.g.*, *Crewe Corp.* v. *Feiler*, 140 A.2d 411, 418 (N.J. Super. Ct. App. Div. 1958), *rev'd on other grounds*, 146 A.2d 458 (N.J. 1958).

[8] *See also Johnson* v. *West Suburban Bank*, 225 F.3d 366, 377 n.4 (3d Cir. 2000) ("This court has never addressed the question whether class actions can be pursued in arbitral forums, though it appears impossible to do so unless the arbitration agreement contemplates such a procedure." (citing *Champ*, 55 F.3d at 274-275)); *Stolt-Nielsen*, 130 S. Ct. at 1771 (describing conflict between *Champ* rule and state-law decisions in California and South Carolina that this Court did not resolve in *Bazzle*).

2. It bears emphasis that, after *Stolt-Nielsen*, there is no room in this context for the sort of legal analysis that may be framed in terms of contractual interpretation or the parties' intent, but in fact involves a court or arbitrator's interpolation of an additional contract term based on, for example, the adjudicator's sense of "community standards of fairness and policy." *Restatement (Second) of Contracts* § 204, cmt. d (1979); *see Stolt-Nielsen*, 130 S. Ct. at 1775 (quoting *Restatement* § 204). As *Stolt-Nielsen* makes clear, that sort of policy-based "interpretation" of an arbitration agreement is not permissible under the FAA. *See* 130 S. Ct. at 1767-1770, 1775-1776. Indeed, even state law may not impose a policy preference for the availability of class procedures as a necessary term, or condition on the enforceability, of a private arbitration agreement. *Concepcion*, 131 S. Ct. at 1750-1751 (class arbitration is "inconsistent with the FAA" to the extent it is "manufactured by [state law] rather than consensual").

The record in this case suggests that the best explanation for the arbitrator's contorted attempts at textual analysis may be just such a policy preference. In his first opinion on clause construction, the arbitrator observed that if the parties' agreement prohibited court actions but did not authorize class arbitration, Dr. Sutter would not be able to pursue class claims at all. Pet. App. 48a. The arbitrator thought that possibility so "bizarre" that it could not be accepted unless the agreement expressly *precluded* class arbitration. *Id.* Similarly, he reasoned that Oxford, having chosen to enforce its arbitration agreement when Sutter tried to bring a putative class action in court, should be "judicially estopped"—*i.e.*, barred by the adjudicator's sense of fairness or equity—from arguing that the agreement did not permit class arbitration. *Id.* at 40a.

In his second opinion, after *Stolt-Nielsen*, the arbitrator returned to the theme that respondent surely *must* be able to bring a class action *somewhere*. He repeated the "estoppel" point and then suggested, in addition, that if class arbitration were not permissible, the arbitration agreement should not be enforced at all. Pet. App. 41a ("[I]f the clause cannot permit Dr. Sutter's court class action to go to arbitration, then Dr. Sutter's original class action must be outside of the arbitration agreement altogether ... and the court class action should be reinstated."); *see id.* at 40a-42a (relying heavily on the fact that Oxford enforced the parties' agreement by having Sutter's judicial class action dismissed in favor of arbitration). Clearly, then, when this arbitrator concluded that the parties' arbitration clause "must have been intended to authorize class actions" (*id.* at 48a), that conclusion was driven largely if not entirely by his policy view concerning what procedural options Sutter ought to have. *Stolt-Nielsen* makes quite clear that an arbitrator "exceed[s his] powers," 9 U.S.C. § 10(a)(4), when he seeks to conduct class proceedings on the basis of such a policy predilection, rather than faithfully enforcing the arbitration agreement that the parties before him actually made. 130 S. Ct. at 1767-1770; *see also Concepcion*, 131 S. Ct. at 1748-1749, 1750-1751.

III. THE ARBITRATOR EXCEEDED HIS POWERS BY IMPOSING CLASS ARBITRATION IN THE ABSENCE OF ACTUAL AUTHORIZATION BY THE PARTIES

A. The Court Below Refused To Review Whether There Was A Legitimate Contractual Basis For Imposing Class Arbitration

In refusing to vacate the arbitrator's decision under the FAA, the court of appeals did not consider whether his construction of the parties' arbitration clause was correct, or even plausible. Citing the deferential standard of review generally applicable to an arbitrator's contractual interpretations or other rulings (Pet App. 7a), the court reasoned that its only role was to confirm that the arbitrator had "articulated" a "contractual basis" for his determination that was not "totally irrational." *Id.* at 14a, 17a; *see id.* at 15a (dismissing objections to arbitrator's decision as "simply dressed-up arguments that the arbitrator interpreted [the parties'] agreement erroneously").

In *Stolt-Nielsen* this Court, applying the same narrow standard of review, held that arbitrators had "exceeded their powers" within the meaning of 9 U.S.C. § 10(a)(4) by construing an arbitration agreement that was silent on the issue to permit class arbitration. *See* 130 S. Ct. at 1767-1768. The court of appeals here sought to distinguish *Stolt-Nielsen* on the ground that Oxford and Sutter did not "stipulate" that they never reached any actual agreement, one way or the other, about class arbitration. *See* Pet. App. 13a. In the court's view, absent such a candid concession from Dr. Sutter, "the arbitrator in this case was not constrained to conclude that the parties did not intend to authorize class arbitration." *Id.*

In theory, the court acknowledged that the arbitrator *was* constrained by the requirement that there be a "contractual basis" for imposing class arbitration. Pet. App. 14a. In practice, however, the court gave that constraint no effect. As discussed in Part II, there is no plausible contractual basis for concluding that the parties ever contemplated the possibility of class proceedings, let alone agreed to authorize them. If the court had given the question any meaningful review, it would have had to conclude that, as in *Stolt-Nielsen*, the arbitrator here exceeded his powers.

Instead, the court effectively abdicated any responsibility for judicial review. Although it nominally reserved the right of courts to intervene in the face of a "totally irrational" decision (Pet. App. 17a) or "clear evidence of arbitral overreaching" (*id.* at 15a), its ruling on the facts of this case made clear that there was no substance to that promise. If the arbitrator's reasoning here was sufficient to "articulate" an adequate "contractual basis" under *Stolt-Nielsen*, *id.* at 14a, then nothing short of a "conclusive statement of the parties' intent" (*id.* at 15a), either precluding class arbitration or conceding that the agreement does not address the issue, would permit a court to vacate an order imposing class proceedings. All an arbitrator need do is *say* that he or she has "construe[d] the arbitration clause in the ordinary way to glean the parties' intent," *id.* at 38a, and courts are rendered powerless to intervene.

B. Under The FAA And *Stolt-Nielsen*, The Arbitrator's Determination Should Have Been Subject To Meaningful Review

As this Court observed in *Stolt-Nielsen*, however, "merely saying something is so does not make it so." 130 S. Ct. at 1769 n.7. Accepting any "contractual basis" that an arbitrator can "articulate" would betray the promise of *Stolt-Nielsen* that courts will intervene when arbitrators exceed their powers by ordering class arbitrations without all parties' actual consent. It would make *Stolt-Nielsen* "an insignificant precedent." *Jock*, 646 F.3d at 129 n.2 (Winter, J., dissenting). That is manifestly not the right result.

It is a "basic precept" of the FAA "that arbitration 'is a matter of consent, not coercion.'" *Stolt-Nielsen*, 130 S. Ct. at 1773 (quoting *Volt Info. Scis., Inc.* v. *Board of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989)). "[A]rbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration," *AT&T Techs., Inc.* v. *Communications Workers of Am.*, 475 U.S. 643, 648-649 (1986), and the terms of an arbitration agreement delineate the scope of that authority. Because consent as manifested in the arbitration agreement is the wellspring from which the arbitrator's authority flows, an arbitrator's legitimate power is limited to what the parties have agreed to confer. *See Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) ("'[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" (quoting *United Steelworkers of Am.* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960))).

While arbitrators have wide authority to adjudicate those questions that are properly submitted to them, courts play a critical role in ensuring that arbitrators do not stray outside the scope of their mandates. At the outset of a controversy, there is a strong presumption that a court rather than an arbitrator will decide whether the parties have agreed to resolve a particular dispute through arbitration. *See AT&T Techs.*, 475

U.S. at 649 ("Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."). After an arbitrator has ruled, one of the limited grounds on which a court may vacate that decision is that the arbitrator imposed arbitration to an extent greater than that consented to by the parties. *See* 9 U.S.C. § 10(a)(4); *Stolt-Nielsen*, 130 S. Ct. at 1774-1775; *Eastern Associated Coal Corp.* v. *Mine Workers of Am., Dist. 17*, 531 U.S. 57, 62 (2000) (courts defer to arbitrators when the "'arbitrator is even arguably construing or applying the contract *and acting within the scope of his authority*" (emphasis added)).

This independent judicial check on the exercise of arbitral authority is vital to ensuring that arbitrators do not arrogate to themselves powers that the parties have not delegated to them. If arbitrators could define the scope of their own jurisdiction, they "would be empowered 'to impose obligations outside the contract limited only by [their] understanding and conscience.'" *See AT&T Techs.*, 475 U.S. at 651; *see also First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 945 (1995) (noting the "significance of having arbitrators decide the scope of their own powers"); *Stolt-Nielsen*, 130 S. Ct. at 1767 (arbitration award must be vacated "when [an] arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice'"). Effective judicial checks are thus essential to provide contracting parties with the confidence to entrust their disputes to arbitration. If they do not believe that such checks will be applied effectively if and when needed, parties will have a "'drastically reduced'" willingness to enter into arbitration agreements in the first place. *AT&T Techs.*, 475 U.S. at 651; *see also Concepcion*, 131 S. Ct. at 1752 n.8

(requiring class arbitration would have a "substantial deterrent effect on incentives to arbitrate"). That would be contrary to the purpose of the FAA, which "was designed to promote arbitration." *Concepcion*, 131 S. Ct. at 1749.

Stolt-Nielsen makes clear that the basic limitations on an arbitrator's legitimate power include not only what issues the parties have agreed to submit to arbitration but also "*with whom* they [have chosen] to arbitrate their disputes"—including whether they have authorized class arbitration. 130 S. Ct. at 1774. Indeed, meaningful judicial oversight is particularly important in the context of class arbitration. As the Court has recognized, a shift from bilateral to class arbitration has the effect of transforming a process that is meant to be a fast, informal, and inexpensive means of dealing with relatively low-stakes disputes into one that can (as this case demonstrates) take decades to complete; that rivals court litigation in cost and complexity; and that exposes defendants to potentially crippling liability without the protection of full judicial review, increasing the risk of *in terrorem* settlements of dubious claims. *See, e.g.*, *Concepcion*, 131 S. Ct. at 1750-1753.

Moreover, class arbitration determinations are ones that even the best-intentioned arbitrator may find it difficult to approach with complete impartiality. For one thing, as both this case and *Stolt-Nielsen* attest, whether class proceedings should be available to claimants is the sort of issue on which arbitrators may have strong policy views that they may find difficult to put aside. *See* Part II.B.2, *supra*. In addition, arbitrators—unlike judges—are compensated by the parties before them, typically based on the time devoted to resolving a particular matter. They thus have a direct, inevitable, and significant financial interest in decisions concerning the availability of class arbitration because any determination to proceed on a class basis will substantially increase the length and scope of the proceedings. *See* DRI Amicus Br. in Support of Pet. 12 & n.4; *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 416 (1967) (Black, J., dissenting) (noting "serious questions of due process" raised by submitting threshold issue to arbitrators where "[t]heir compensation corresponds to the volume of arbitration they perform"). If only for the purpose of preserving public confidence in the process, such decisions must be subject to some meaningful degree of independent review.

For these reasons, courts must stand ready to vacate awards that would impose class arbitration without a proper contractual basis, even given the normally "high hurdle" of FAA review. *See Stolt-Nielsen*, 130 S. Ct. at 1767.[9] In *Reed*, for example, the Fifth Circuit properly "read *Stolt-Nielsen* as requiring courts to ensure that an arbitrator has a legal basis for his class arbitration determination, even while applying the appropriately deferential standard of review." 681 F.3d at 645. Under this approach, a court may not merely observe that an arbitrator endeavored or purported to construe the parties' agreement. Although the Fifth Circuit recognized the need to apply an "appropriately deferential standard of review," it properly insisted on some real "consideration of the arbitrator's award and rationale" and some independent assessment of the award's substantive merit. *Id.* Applying that limited but meaningful degree of scrutiny, the *Reed* court held that an arbitrator exceeded his authority by imposing class arbitration solely on the basis of a broadly-worded "any dispute" arbitration clause materially indistinguishable from the one at issue here.

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[9] Indeed, under *Stolt-Nielsen*'s reasoning, whether parties have agreed to authorize class arbitration is likely a threshold or "gateway" issue of arbitrability that courts should presumptively address or review *de novo*. *See* 130 S. Ct. at 1771-1772 (noting open question); *cf. Bazzle*, 539 U.S. at 456-457 (dissenting opinion); *see also Howsam*, 537 U.S. at 83-86 (discussing distinction between issues of arbitrability and routine procedural issues); *Central W. Va. Energy, Inc.* v. *Bayer Cropscience LP*, 645 F.3d 267, 275 (4th Cir. 2011) (reasoning that "*Stolt-Nielsen* found that the particular question of whether parties had '*agreed to authorize* class arbitration' was not one of procedure" committed to arbitrators under *Howsam*, but concluding that issue was not presented on facts of case); *Reed Elsevier, Inc.* v. *Crockett*, 2012 WL 604305, at *6 (S.D. Ohio Feb. 24, 2012) (holding that the availability of class arbitration is a gateway issue of arbitrability), *appeal docketed*, No. 12-3574 (6th Cir. May 17, 2012). The issue is not squarely presented in this case because in 2003 the parties here, like those in *Stolt-Nielsen* (*see* 130 S. Ct. at 1772), understood this Court's decision in *Bazzle* to direct the question whether the arbitration clause permitted class proceedings to the arbitrator at least in the first in-

At least the same degree of judicial review is required in this case. Indeed, as discussed above, the arbitrator's stated reasoning here is so deficient that it cannot be sustained under *any* meaningful standard of review. Whatever "contractual basis" may be minimally adequate to permit a court or arbitrator to conclude that parties "*agreed to authorize* class arbitration, *Stolt-Nielsen*, 130 S. Ct. 1776 & n.10, the agreement here is surely not enough.

---

stance (*see* Pet. App. 45a), and Oxford did not argue for *de novo* review on this basis in the lower courts.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

STATUTORY PROVISIONS

9 U.S.C. § 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

9 U.S.C. § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

9 U.S.C. § 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

9 U.S.C. § 6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

9 U.S.C. § 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

9 U.S.C. § 8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

9 U.S.C. § 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

9 U.S.C. § 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

9 U.S.C. § 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

9 U.S.C. § 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

9 U.S.C. § 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

9 U.S.C. § 14. Contracts not affected

This title shall not apply to contracts made prior to January 1, 1926.

9 U.S.C. § 15. Inapplicability of the Act of State doctrine

Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.

9 U.S.C. § 16. Appeals

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
FEB 21 2013
OFFICE OF THE CLERK

No. 12-135

IN THE

Supreme Court of the United States

OXFORD HEALTH PLANS LLC,

Petitioner,

v.

JOHN IVAN SUTTER,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Did the arbitrator "exceed[] [his] powers," within the meaning of section 10(a)(4) of the Federal Arbitration Act, when he concluded that the arbitration paragraph agreed to by the parties authorized class arbitration?

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STATEMENT

(1) This litigation arose out of a controversy regarding the manner in which health insurance companies reimburse physicians. The vast majority of patients with private insurance are covered by plans under which health insurers enter into agreements with physicians and other health care providers, so-called network providers, to compensate them at specified rates for particular medical procedures. Plans are typically structured to impose substantial additional costs on patients who obtain treatment by doctors outside the network. Thus most doctors have no choice but to accept these network agreements on the terms dictated by the insurance companies.

These companies' provider agreements often delineate each of the medical procedures using the Current Procedural Terminology (CPT) codes established by the American Medical Association, setting a specific rate of compensation for each. Health insurers have repeatedly violated these agreements in the three specific ways involved in this case. First is the practice known as "bundling." Where a doctor has provided several distinct medical services, health insurers often refuse to pay for all of the services that occurred, instead treating the medical care as a single bundle paying for only some of the procedures involved. Second is the practice known as "downcoding." Insurers unilaterally alter the CPT codes for which reimbursement is sought, so that the physician is paid for a less expensive medical procedure than was actually provided. Third is delaying payment to physicians, in violation of statutory prompt-payment requirements that are incorporated into agreements between the insurers and the physicians. These delays enable the insurers to earn interest on the large sums they have received as premiums. *See In re Managed Care Litig.*, 135 F. Supp. 2d 1253, 1256-57 (S.D. Fla. 2001).

These practices typically are embodied in the computer programs that process claims, so that the violations are systemic and the total amount of compensation withheld by the companies is substantial, and the alteration of CPT codes is often concealed from the providers. For most physicians, however, the amount of compensation lost to any single insurance company is relatively modest; in the instant case the plaintiff's losses were about $1,000 a year. Thus the amount of an individual physician's losses would ordinarily be small enough that it would make no economic sense to hire a lawyer to sue the insurance company for these contract violations. In some instances physicians have obtained redress for these practices in small claims court, where (unlike in regular courts or arbitration) the filing fees are nominal and no attorney is required. As a practical matter, however, a health insurance company can engage in bundling, downcoding and delayed payment with relative impunity unless the physicians affected can challenge those practices in a class action.

(2) Respondent John Ivan Sutter is a pediatrician in Clifton, New Jersey, a suburb of New York City. Oxford Health Plans LLC is one of the major health insurance companies in the state. Like other health insurance plans, Oxford contracts with physicians who become part of its provider network. At the time when this dispute arose Oxford insured more than 300,000 people who lived or worked in New Jersey, and its network included more than 13,000 physicians and other health care providers. In

1998 Sutter signed an agreement with Oxford, becoming one of the company's network physicians. Oxford agreed to reimburse Sutter at particular rates spelled out in the agreement, using the CPT codes to delineate the procedures at issue. J.A. 11-12, 21-24.

This litigation began in 2002, when Sutter filed an action in New Jersey Superior Court on behalf of himself and a class consisting of all physicians who render medical services to patients who are members of health insurance plans sponsored by Oxford. Sutter's complaint asserted that Oxford had engaged in improper bundling and downcoding, in violation of the providers' agreements with Oxford, and also asserted a number of state statutory claims, including an assertion that Oxford had violated New Jersey's prompt-payment laws. The complaint specifically delineated both individual claims on behalf of Dr. Sutter and class claims on behalf of the other New Jersey physicians in Oxford's network.

Oxford moved to stay the lawsuit under the Federal Arbitration Act (FAA) and the similarly worded New Jersey Arbitration Act. N.J.S.A. 2A:24-1, et seq. Oxford relied on paragraph 11 of its agreement with Sutter, the first sentence of which provides:

> No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association with one arbitrator.

J.A. 15-16. This sentence contains two distinct provisions. The first, which prohibits instituting certain civil actions, applies to a "civil action concerning any dispute arising under this Agreement." By itself, this provision simply bans resort to courts, and does not require (or even authorize) arbitration. The second provision directs that certain disputes "be submitted to final and binding arbitration." The decisions below are at times confusing because they often use the phrase "the arbitration clause" or "the clause," without explaining whether they are referring to paragraph 11, to its entire first sentence, or only to the mandatory arbitration provision. For clarity, we refer to the first part of the sentence as the "no-civil-action provision," to the second part of that sentence as the "mandatory arbitration provision," and to paragraph 11 as "the arbitration paragraph."

The arbitration paragraph also provides that the arbitrator's decision would be "final and binding," and "may be confirmed and entered as a final judgment in any court of competent jurisdiction and enforced accordingly." Pet. App. 93a.

In state court Oxford argued that under the FAA, and the state's arbitration law, it was entitled to a stay of Sutter's entire action, including the class claims. Neither the FAA nor that state's law creates a right to enforce a simple waiver of the right to file suit; rather, both establish an entitlement only to the specific performance of an agreement to *arbitrate* a particular matter. Thus whether Oxford was entitled under the FAA and state law to end Sutter's entire civil action, or only a portion of that action, depended on whether all or only part of Sutter's lawsuit was subject to the mandatory arbitration provision.

Sutter argued that although the mandatory arbitration provision would apply to his contract claims, it did not apply to his state statutory claims.[1] Those statutory causes of action, Sutter contended, did not "arise under" his agreement with Oxford. Oxford responded that there was no difference between the coverage of the mandatory arbitration provision and the no-civil-action provision; both applied to the same disputes. "Sutter's . . . Agreement with Oxford requires arbitration of all 'civil action[s] concerning any dispute under' the . . . Agreement."[2] Oxford's attorney reiterated at the oral argument on its motion this insistence that the mandatory arbitration provision applied to everything subject to the no-civil-action provision.

> Sutter's contract here says that all *actions* concerning any disputes arising under the agreement should be sent to arbitration.[3]

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[1] Plaintiff's Brief in Opposition to Defendant's Motion to Compel Arbitration and to Dismiss, 23-27.

[2] Oxford's Memorandum of Law in Support of Its Motion to Stay and/or Dismiss in Part the Amended Complaint, 7; *see id.* 12 (referring to "Sutter's agreement to arbitrate any 'civil action concerning any dispute' arising under the . . . Agreement'"); Oxford's Reply Memorandum of Law in Further Support of Its Motion to Stay and/or Dismiss in Part The Amended Complaint, 2 ("Sutter['s] . . . contract requires arbitration of all 'civil action[s] concerning any dispute arising under' his . . . Agreement"), 11 ("Sutter's [s]tatutory [c]laims [m]ust [b]e [a]rbitrated [because] [t]hey 'concern[] [a] dispute' between Oxford and Plaintiffs regarding matters that 'aris[e] under' the . . . Agreement") (emphasis omitted).

[3] Transcript of Motion, Oct. 25, 2002, 6 (emphasis added).

> [P]laintiff quoted the contract here as saying that any dispute arising under the contract needs to be arbitrated. That's wrong. The contract says, *actions* concerning any dispute arising under. That already broadens up the claim.[4]

The transcript of that proceeding was part of the record before the arbitrator.

The state court agreed that the mandatory arbitration provision applied to the statutory as well as the contract claims, and dismissed the action in its entirety. The court's orders described in broad terms the claims it was referring to arbitration. In its October 25, 2002 order, the court stated that it was dismissing the complaint "as the matters raised should properly be referred to arbitration." The court's November 21, 2002 order recited that "the claims in Plaintiff's Amended Complaint are hereby referred to arbitration." J.A. 25-26. Prior to the state court's ruling on Oxford's motion, Sutter had asked that court to direct that any arbitration proceed as a certified class action.[5] The state judge declined to act on that motion, instead ordering that "all procedural issues including, but not limited to, the determination of class certification, shall be resolved by the arbitrator." J.A. 26.

Sutter filed a demand for arbitration with the American Arbitration Association and an arbitrator was appointed in the spring of 2003. Following this Court's decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), the parties filed briefs regarding whether the arbitration paragraph authorized class action proceedings. Oxford insisted that it was the intention of the parties that there be no class actions, and advanced a variety of arguments for that construction of the agreement. Oxford did not, however, disavow the position it had taken in the state court less than a year earlier that the agreement required arbitration of any "*action* concerning any dispute arising under th[e] agreement." Nor did Oxford dispute that the arbitrator had the authority to decide the issue of whether the agreement authorized arbitration of class claims.

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[4] Id. at 30 (emphasis added).

[5] Letter of Eric D. Katz to Hon. Stephen J. Bernstein, Oct. 21, 2002.

The arbitrator concluded that the first sentence of the arbitration paragraph (which he referred to as "the arbitration clause" or "the clause") authorized class actions. The linchpin of the arbitrator's analysis was his conclusion that the no-civil-action provision and the mandatory arbitration provision were co-extensive; everything excluded from litigation by the no-civil-action provision had to be (and thus could be) arbitrated under the mandatory arbitration provision. "Having prohibited [in the no-civil-action provision] all conceivably possible civil actions," the arbitrator reasoned, the mandatory arbitration provision:

> takes this universal and unlimited class of prohibited civil actions and says, "and all such disputes shall be submitted to final and binding arbitration . . . ."
>
> This means that [the mandatory arbitration provision of the] clause sends to arbitration "all such disputes," which, apart from the prohibition [in the no-civil-action provision],

> could have been brought in the form of any conceivable civil action. Since there can be no dispute in any court without a civil action of some sort, the disputes that the [mandatory arbitration provision of the] clause sends to arbitration are ***the same universal class of disputes*** that the [no-civil-action provision of the] clause prohibits as civil actions before any court. It follows that the intent of [the first sentence of paragraph 11], read as a whole, is to vest in the arbitration process everything that is prohibited from the court process.

J.A. 31 (emphasis added).[6]

Because class actions are among the proceedings barred by the no-civil-action provision, the arbitrator concluded, they must be among the matters that are subject to the mandatory arbitration clause.

> A class action is plainly one of the possible forms of civil action that could be brought in a court concerning a dispute arising under this Agreement. . . .
>
> Therefore, because all that is prohibited by the first part of [the first sentence of paragraph 11] is vested in arbitration by its second part, I find that the arbitration clause must have been intended to authorize class actions in arbitration.

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[6] The arbitrator uses the phrase "clause" to refer to the entirety of the first sentence of paragraph 11, and refers to the no-civil-action provision as "[t]he introductory phrase." Because that sentence includes two distinct provisions, the bracketed material has been inserted to avoid confusion.

J.A. 31-32. The arbitrator believed that Oxford, having invoked the first sentence of the arbitration paragraph "to prohibit a class action in court, . . . ought to be bound by judicial estoppel from arguing in this arbitration that the class action part of the case is not governed by the [mandatory arbitration] clause." J.A. 32. The arbitrator rejected Oxford's arguments that class arbitration was precluded by other provisions of the agreement. J.A. 33-36.

Following the arbitrator's 2003 decision that the agreement permitted class actions, the parties proceeded to litigate whether a class action was appropriate under the particular circumstances of this case. In 2005 the arbitrator decided that the arbitration should proceed as a certified class action, and issued an "Award" defining the class and delineating the class claims to be resolved. J.A. 38-55. Oxford filed suit in federal court under section 10 of the FAA to vacate the award. The district court refused to vacate either the arbitrator's 2003 interpretation of the arbitration paragraph or the arbitrator's 2005 decision to certify a class action. Pet. App. 69a-72a. Oxford appealed only the portion of the district court's decision regarding the 2005 Award certifying a class, and did not dispute on appeal the 2003 arbitral decision interpreting the arbitration paragraph. The Third Circuit affirmed the district court decision refusing to vacate the Award. Pet. App. 55a-59a.

In 2010 the arbitrator dismissed on the merits the most important aspect of Sutter's state statutory prompt-payment claims. Sutter sought to vacate that arbitration decision in district court under section 10(a)(4) of the FAA. The court refused to vacate the arbitrator's decision.[7]

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[7] *Sutter v. Oxford Health Plans, LLC*, Civ. No. 10-4903 (GEB)(D.N.J. 2011).

Also in 2010, following this Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010),Oxford renewed its challenge to the arbitrator's interpretation of the arbitration paragraph. Although Oxford raised a variety of objections to the arbitrator's 2003 decision, it did *not* challenge the arbitrator's earlier holding that under the arbitration paragraph the mandatory arbitration provision applied to all the matters that were excluded from court by the no-civil-action provision. And again, Oxford did not contest that the question of interpretation of the agreement was properly before the arbitrator; indeed, Oxford itself insisted that the arbitrator decide the issue once more.

The arbitrator carefully reviewed this Court's opinion in *Stolt-Nielsen*, and concluded that it was consistent with his earlier 2003 decision. In *Stolt-Nielsen*, the arbitrator noted, the parties stipulated that they had never reached any agreement regarding class arbitration; the arbitrators in that case thus had no cause to interpret the written agreement that the parties had signed. In this case, the arbitrator pointed out, there was no such stipulation, and he was thus empowered and required to interpret the arbitration paragraph of the parties' written agreement. J.A. 68-71.

The arbitrator's 2010 decision again rested on his view that the no-civil-action provision and the mandatory arbitration provision were co-extensive. The arbitrator emphasized that the no-civil-action provision clearly applied to a class action.

> No civil action, in my view, means no civil action, of any form whatsoever. . . . [A] class action

> is a form of civil action . . . . "No civil action" simply cannot, as a matter of English, be read to exclude any particular civil proceeding, including a class action, from its coverage.

J.A. 73. Conversely, the arbitrator pointed out, if class actions were outside the scope of the mandatory arbitration clause, they would also be outside the scope of the co-extensive no-civil-action clause; Oxford itself, however, had invoked the no-civil-action provision to defeat the state court class action.

> Oxford persuaded the New Jersey court . . . that Dr. Sutter's class action in court was required by the clause in question to be sent to arbitration. . . .
>
> [I]f the clause cannot permit Dr. Sutter's court class action to go to arbitration, then Dr. Sutter's original class action must be outside of the arbitration agreement altogether. Oxford would have to have misled the New Jersey court, and the court class action should be reinstated. This is another way of describing why Oxford should be judicially estopped from advancing this argument.

J.A. 75.

Responding to Oxford's objection that his 2003 order had noted that class arbitration was not excluded from the first sentence of the arbitration paragraph, the arbitrator explained that his original order merely pointed out that the inclusive language of the mandatory arbitration provision was properly read—in the absence of any specific exclusion—to encompass everything within the scope of the no-civil-action provision, which itself included class actions.

> Oxford argues that the [2003] Award relied on the absence of specific exclusion of class-action arbitration from this clause to indicate that it was the intention of the parties to include class arbitration[.] If true, this reasoning would run afoul of *Stolt-Nielsen*. However, the [2003] Award was not based on such reasoning. The absence of such an exclusion was not something that had to be relied on to divine the meaning of the clause. It merely corroborated what was already obvious from the language of the clause itself. "All" [in the mandatory arbitration provision] means all. . . . [I]f it had been the parties' intention to exclude class actions from the clause, in the face of such sweeping language, normal drafting would have suggested a specific exclusion.

J.A. 73. For its part, Oxford did not argue that the no-civil-action provision did not apply to class actions.

Oxford moved to reopen the district court action it had originally filed in 2005, and asked the court to vacate the arbitrator's 2010 decision. The district court rejected Oxford's contention that under *Stolt-Nielsen* an arbitrator can only order class proceedings if the underlying agreement expressly uses words such as "class action." Pet. App. 28a. The district court also declined, as Oxford had urged, "to revisit and reconsider virtually every aspect of [the 2010] Order." Pet. App. 27a. "Viewed in sum, Oxford's arguments advocate for a standard that appears closer to *de novo* than deferential review." Pet. App. 27a-28a.

The Third Circuit affirmed. The appellate court, like the district court, held that *Stolt-Nielsen* does not require an explicit reference to class actions. Pet. App. 13a n.5. The court of appeals rejected Oxford's contention that the arbitrator's detailed analysis of the contractual terms was not undertaken in good faith, but was instead a "pretext for the imposition of his policy preferences." Pet. App. 14a. "Oxford's allegations of pretext are simply dressed-up arguments that the arbitrator interpreted its agreement erroneously." *Id.* 15a. Oxford had raised a number of arguments of "factual or legal error" in the arbitrator's decision (*id.* 16a); the Third Circuit held that those contentions were "uncognizable." *Id.* Section 10 of the FAA, the court of appeals reasoned, permits an award to be vacated "only upon one of the four narrow grounds enumerated in [section 10]. . . . Those grounds are exclusive." *Id.* 6a. Section 10 does not authorize a federal court to "entertain claims that an arbitrator made factual or legal errors." *Id.* 5a.

The court of appeals denied Oxford's petition for rehearing en banc. This Court granted certiorari. 133 S. Ct. 786 (2012).

SUMMARY OF ARGUMENT

This is a case about the finality of an arbitral decision under the Federal Arbitration Act. Section 10 authorizes a court to vacate an arbitral decision "only in very unusual circumstances." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995). This case does not present any of the exceptional circumstances specified in section 10.

In an application to vacate under section 10(a)(4) of the FAA, challenging an arbitrator's decision regarding the meaning of a contract, the plaintiff can only establish that the arbitrator "exceeded [his] powers" by showing either (1) that the arbitrator had no power to interpret the contract, or (2) that the arbitrator's decision was not actually based on an interpretation of the contract. An attempted demonstration that the arbitrator misconstrued the contract could not establish, as section 10(a)(4) requires, that the arbitrator "exceeded [his] powers." The power to interpret a contract includes the power to interpret the contract incorrectly.

In this case the arbitrator was clearly authorized to determine the meaning of the arbitration paragraph. Oxford itself repeatedly submitted that very question to the arbitrator. The arbitrator's decision to order class arbitration was based on his interpretation of the arbitration paragraph.

This case is quite unlike *Stolt-Nielsen*. There the arbitrators exceeded their powers by resting their decision on an issue they had no authority to resolve, deciding based on their own policy preferences whether a default rule in favor of class actions was "the best rule to be applied in the situation," rather than determining what default rule was required by the FAA, federal maritime law, or New York law. Here, on the other hand, the arbitrator *did* base his decision on the relevant governing standard, the meaning of the agreement between Oxford and Sutter.

This Court should not, as Oxford appears to propose, create some new scheme for "meaningful review" or "judicial . . . policing" of the correctness of an arbitrator's decision. The grounds set out in section 10 for vacating an arbitrator's decision are exclusive. Permitting judicial reconsideration of the correctness of an arbitrator's decision would destroy the finality of arbitral decisions that is the foundation of arbitration under the FAA.

Although the correctness of the arbitrator's interpretation of the arbitration paragraph is not subject to judicial review, that interpretation was sound. The arbitrator reasonably concluded that the mandatory arbitration provision of the agreement referred to arbitration the same matters that the no-civil-action provision excluded from court. Oxford itself insisted in the prior state court proceedings that the two provisions were co-extensive. The state court would have had no authority under the FAA to stay or dismiss the class claims, as Oxford requested and the state court ordered, unless those claims were covered by the mandatory arbitration provision of the agreement between Oxford and Sutter, and not merely by the no-civil-action provision.

INTRODUCTION

This is a case about the finality of arbitral decisions under the Federal Arbitration Act. This Court long ago admonished that permitting judicial review of an award for legal or factual error would result in "a substitution of the judgment of the [court] in place of the judge chosen by the parties, and would make an award the commencement, not the end, of litigation." *Burchell v. Marsh*, 58 U.S. 344 (1854).

Section 10 of the FAA authorizes a court to vacate an arbitral decision "only in very unusual circumstances."

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995). That strict limitation on the grounds on which an award can be overturned under section 10 is "needed to maintain arbitration's essential virtue of resolving disputes straightaway." *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008). Permitting a party to challenge an award on broader grounds would "open[] the door to the full-bore legal and evidentiary appeals that can 'rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process,' . . . and bring arbitration theory to grief in post-arbitration process." *Id.* (*quoting Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F. 3d 987, 998 (9th Cir. 2003)).

Oxford itself invoked the limitations imposed by section 10 in an earlier phase of this litigation. In 2010 the arbitrator issued an order rejecting on the merits the most important of Sutter's state statutory prompt-payment claims; the total value of the dismissed claims was several million dollars.[8] When Sutter filed suit under section 10(a)(4) of the FAA challenging that adverse decision, Oxford forcefully and successfully argued that federal courts had no authority to review the merits of an arbitral decision.[9]

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[8] Brief in Support of Plaintiff's Motion to Vacate Procedural Order No. 19, *Sutter v. Oxford Health Plan, LLC*, 1-5.

[9] Brief in Opposition to Plaintiff Class's Application to Vacate Procedural Order No. 19 and in Support of Motion to Dismiss Verified Complaint, 12 ("To demonstrate that the Arbitrator exceeded his powers, it is not enough for the Class to show that the arbitrator 'committed an error – or even a serious error.' *Stolt-Nielsen.* The Class must show that the Arbitrator's ruling is so irrational that no basis for it can be inferred or rationally derived from the facts of the case or the parties' arguments and

In 2010 the arbitrator also rejected Oxford's request that he rescind his earlier determination that the arbitration paragraph authorizes class proceedings. Oxford challenged that 2010 arbitral decision under section 10(a)(4) in an action before the same judge who heard Sutter's section 10(a)(4) action; it is Oxford's attack on that 2010 arbitral decision that is at issue in this case. In this Court Oxford now argues that section 10(a)(4) mandates careful judicial scrutiny of the correctness of an arbitrator's decision, insisting that such thorough "judicial . . . policing" (Pet. Br. 14)—precisely the judicial role Oxford adamantly opposed in response to Sutter's own action under section 10(a)(4)—is required by the FAA.

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submissions to the Arbitrator." (footnote omitted)); Reply Brief in Further Support of Oxford's Motion to Dismiss the Verified Complaint, 6 ("[A]n arbitrator's ruling must be 'viewed in context' to see whether a basis can be inferred from the arbitration record."), 6-7 ("Sutter also unfairly criticizes the Arbitrator for the brevity of his ruling. . . . Absent a requirement for a 'reasoned' award, an arbitrator's ruling need not provide any explanation."), 9 ("[E]ven if the Arbitrator seriously misinterpreted the commentary, that would not establish that . . . he . . . exceeded his powers. *See Stolt-Nielsen* . . . ('even a serious error' does not establish that arbitrator exceeded his powers.")), 12 ("Sutter contends that the Arbitrator's ruling is an error, perhaps even serious error. But, even if Sutter were right, this does not mean that the Arbitrator . . . exceeded his powers, as required for vacatur."); Brief in Opposition to Plaintiff Class's Application to Vacate Procedural Order No. 19 and In Support of Motion to Dismiss Verified Complaint, 1-2 (section 10(a)(4) requires "a showing that the Arbitrator's ruling was so irrational that it could not have been rationally derived from the facts of the case or the parties arguments and submissions"), 12 ("To demonstrate that the Arbitrator exceeded his powers, . . . [t]he Class must show that the Arbitrator's ruling is so irrational that no basis for it can be inferred or rationally derived from the facts of the case or the parties' arguments and submissions to the Arbitrator.")

The meaning of the strict limitations established by section 10 of the FAA on the grounds on which an arbitral decision may be vacated, however, does not vary depending on which party prevailed before an arbitrator or on which provision of a contract an arbitrator may have interpreted. The agreement between Oxford and Sutter provided that the arbitration decision would be "final and binding." Oxford is not entitled, merely because the decision in this instance was in favor of Sutter, to downgrade the arbitrator's decision to tentative and advisory.

I. SECTION 10(a)(4) ONLY PERMITS VACATUR OF AN ARBITRATOR'S DECISION ON EXCEPTIONALLY NARROW GROUNDS

Section 10(a)(4) of the FAA authorizes a court to vacate an award "where the arbitrators have exceeded their powers." 9 U.S.C. § 10(a)(4). The statutory language concerns only whether the arbitrators had the "power" to issue the award, not whether the arbitrators exercised that power correctly. Section 10 as a whole is concerned with "extreme arbitral misconduct," *Hall Street*, 552 U.S. at 586, not arbitral errors. "Section 10 . . . , after all, addresses egregious departures from the parties' agreed-upon arbitration: 'corruption,' 'fraud,' 'evident partiality,' 'misconduct,' 'misbehavior,' [and] 'exceed[ing] . . . powers[.]' . . . . 'Fraud' and a mistake of law are not cut from the same cloth." *Id.*

The powers of an arbitrator derive from the contract in which the parties have agreed that certain claims or issues are to be resolved by arbitration. It is the scope of the "powers" conferred on an arbitrator by that contract to determine the specified disputes that is the touchstone of section 10(a)(4).[10] Where a party argues that the arbitrator's resolution of a particular issue exceeded his or her powers under section 10(a)(4), the controlling question is not whether that issue was correctly decided, but whether the arbitrator had the authority to decide the issue at all. "[A]rbitrators . . . exceed[] their authority [if they go] beyond the limits of the submission," and decide a matter "not contained in the submission." *Burchell v. Marsh*, 58 U.S. 344, 350-51 (1854).

Arbitrators can exceed their power in either of two ways. First, arbitrators exceed their powers if they resolve a dispute that the parties have not submitted for arbitration. For example, in the labor context if a union and employer asked the arbitrators to decide whether a particular employee was improperly dismissed, the arbitrators would exceed their authority if they (instead or also) decided that the worker was underpaid. Second, arbitrators would exceed their powers if they resolve a submitted dispute on a ground different from that agreed upon by the parties. Thus if in a commercial dispute the parties agreed to arbitrate the validity of a contract, and also agreed that the issue should be governed by New York law, the arbitrators would exceed their powers if they invalidated the contract on the ground that it violated California law. In the latter case the grounds on which an arbitrator made a determination are relevant under section 10(a)(4), *not* because it matters whether the arbitrator got the right answer, but because the arbitrator's reasoning reveals whether the arbitrator was resolving the right question. The arbitrator only has the authority to decide a dispute applying the standard agreed upon, expressly or implicitly, by the parties.

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[10] The Question Presented framed by Oxford is "[w]hether an arbitrator exceeds his powers *under the Federal Arbitration Act* by determining that the parties affirmatively 'agreed to authorize class arbitration,' *Stolt-Nielsen*, 130 S. Ct. at 1776, based solely on their use of broad contractual language . . . . ." (Pet. Br. I)(emphasis added and omitted). That misapprehends the issue raised by an application for vacatur under section 10(a)(4); the question in such a case is whether the arbitrator exceeded the powers conferred by the parties' agreement, not by the FAA.

Litigation under section 10(a)(4) may present a need to determine what question was submitted to the arbitrators and/or to ascertain what question the arbitrators actually decided. *Stolt-Nielsen* presented both types of situations. First, the arbitrators in that case would have exceeded their powers if they had decided whether the parties had agreed to authorize class arbitration,[11] because the parties had not presented a dispute over that question to the arbitrators. "[T]he panel had no occasion to 'ascertain the parties' intention' in the present case because the parties were in complete agreement regarding their intent." 130 S. Ct. at 1770. The parties had stipulated that there was no agreement between them regarding the permissibility of class proceedings. "This stipulation left no room for an inquiry regarding the parties' intent, and any inquiry into that settled question would have been outside the panel's assigned task." *Id.* Second, the issue that was properly before the arbitrators, this Court held, was to identify under the FAA, New York law, or maritime law, the appropriate default rule in the absence of an agreement between the parties.[12] But that was not the question that the arbitrators had in fact decided. This Court concluded from the face of the arbitral decision that the arbitrators had not "identif[ied] and appl[ied] a rule of decision derived from the FAA or either maritime or New York law." 130 S. Ct. at 1770; *see* 130 S. Ct. at 1768.

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[11] It was unclear whether the arbitrators had actually done so. The Court noted that the arbitrators' opinion "makes a few references to intent." 130 S. Ct. at 1770.

> Rather than inquiring whether the FAA, maritime law, or New York law contains a "default rule" under which an arbitration clause is construed as allowing class arbitration in the absence of express consent, the panel proceeded as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied in such a situation.

Id. at 1768-69. The arbitrators exceeded their powers in *Stolt-Nielsen*, not because they failed to correctly develop "the best rule to be applied in such a situation," but because they had no power to devise or adopt such a "best rule" at all.

The question in this case is whether the arbitrator exceeded his powers when he interpreted the arbitration paragraph to authorize class arbitration. But where arbitrators interpret a contract and then issue an award based on that interpretation, the party challenging that award does not establish that the arbitrators "exceeded their powers" merely by persuading a court that the arbitrators' interpretation was mistaken. The power to interpret a contract includes the power to interpret the contract incorrectly.

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[12] "Because the parties had agreed their agreement was 'silent' in the sense that they had not reached any agreement on the issue of class arbitration, the arbitrators' proper task was to identify the rule of law that governs in that situation." 130 S. Ct. at 1768.

A claim that an arbitrator's construction of a contract was incorrect therefore is not cognizable under section 10(a)(4) or any other provision of the FAA. "Whether the arbitrators misconstrued a contract is not open to judicial review." *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 203 n.4 (1956).[13] "[T]he courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on . . . [a] misinterpretation of the contract." *United Paperworkers Int'l Union, AFL-CIO, v. Misco, Inc.*, 484 U.S. 29, 36 (1987).

> Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of . . . the meaning of the contract that they have agreed to accept. . . . [T]he parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract.

Id. at 38-39. "It is the arbitrator's construction [of the contract] which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 599 (1960); *see Eastern Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57, 62 (2000) ("[the parties] have 'bargained for' the 'arbitrator's construction' of their agreement") (*quoting Enterprise Wheel*).

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[13] "Judicial review of a[n] . . . arbitration decision pursuant to . . . an agreement is very limited. Courts are not authorized to review the arbitrator's decision . . . despite allegations that the decision . . . misinterprets the parties' agreement." *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001).

These decisions derive from the broader rule that courts may not overturn an arbitrator's decision on the ground that the arbitrator made an error of law or fact. "Courts . . . do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. . . . [I]mprovident, even silly, fact-finding . . . is hardly a sufficient basis for disregarding what the agent appointed by the parties determined to be the historical facts." *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38-39 (1987). "If the award is within the submission and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact." *Burchell v. Marsh*, 58 U.S. 344, 350 (1854). "It is not enough for [challengers] to show that the panel committed an error—or even a serious error." *Stolt-Nielsen*, 130 S. Ct. at 1767. Parties agree to final and binding arbitration not because they are certain that an arbitrator will not make a mistake, even on rare occasion an egregious error, but because they conclude that the risk of error is outweighed by the greater benefits of finality.

To be sure, the power of an arbitrator ultimately derives from the contract authorizing arbitration, and the arbitrator's power to issue a particular award may rest in part or in whole on the meaning of a contractual provision. But that does not mean that an arbitrator exceeds his or her powers when he or she bases an award on an interpretation of a contract that a court may believe is incorrect. The parties in such a situation have agreed not only that the availability of an award will be based on the meaning of their contract, but also that the arbitrator has the final responsibility for determining what that meaning *is*. A court therefore may not hold that an arbitrator exceeded his or her authority because it believes the award at issue was based on a misinterpretation of the contract; in the losing party's section 10(a)(4) challenge to the award, the arbitrator's interpretation of that contract is final and binding on the court as well as the parties.

In *Enterprise Wheel*, for example, the party opposing the award argued "that by applying correct principles of law to the interpretation of the collective bargaining agreement it can be determined that the agreement did not [authorize the disputed award], and that therefore the arbitrator's decision was not based upon the contract." 363 U.S. at 598-99. This Court emphatically disagreed:

> The acceptance of this view would require courts, even under the standard arbitration clause, to review the merits of every construction of the contract. This plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final.

Id. That principle applies equally when the arbitrator construes a contract provision regarding the rights and obligations of the parties (such as how much a physician should be paid for setting a broken leg) and when the arbitrator construes a contract provision regarding how the arbitration is to proceed. An arbitrator's interpretation of a contract is within his powers so long as the arbitrator's decision arguably draws its essence from that contract. *See* pp. 33-36, *infra*.

Stolt-Nielsen does not alter this longstanding principle. *Stolt-Nielsen* holds that a party may not be compelled to submit to class arbitration "unless there is *a contractual basis* for concluding that the party agreed to do so." 130 S. Ct. at 1775 (emphasis added and omitted). Where the parties have agreed that the arbitrator is to construe the underlying agreement, it is for the arbitrator to determine whether that standard has been met. In such a case *Stolt-Nielsen* does not divide responsibility for construing the agreement between the court and the arbitrator, with the court making a threshold determination about whether there is enough contractual foundation to permit (but not necessarily require) the conclusion that there was an agreement to class arbitration, and the arbitrator being limited to deciding whether or not to draw such an inference. Rather, as in other cases where there is a dispute over the meaning of a contract whose interpretation is a matter for arbitration, "[t]he courts . . . have no business weighing the merits of the [disputed interpretation], . . . [and] determining whether there is particular language in the written instrument which will *support* the claim." *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 568 (1960)(emphasis added).

II. THE ARBITRATOR'S INTERPRETATION OF THE ARBITRATION PARAGRAPH OF THE CONTRACT MAY NOT BE VACATED UNDER SECTION 10(a)(4)

In this case, unlike *Stolt-Nielsen*, the arbitrator decided the particular question submitted to him by the parties and resolved that issue on the proper grounds. The arbitrator therefore did not "exceed[his] powers" in ordering class arbitration.

A. The Dispute Regarding the Meaning of The Arbitration Paragraph Was Properly Submitted to The Arbitrator

(1) The question of whether the arbitrator should determine if the arbitration paragraph authorized class proceedings first arose when this case was in the New Jersey state court. Sutter asked that court to order that any arbitration proceed as a class action. Oxford objected that only the arbitrator himself could decide whether there should be class arbitration.

> Procedures for [a]rbitration [m]ust [b]e [d]ecided by the [a]rbitrator. Sutter's . . . argument . . . that the Court 'should first certify this matter as a class action . . . "is impermissible as a matter of law." . . . [A]s the New Jersey Appellate Division has held, once a court determines that a particular dispute is arbitrable, all procedural issues such as class certification are to be resolved by the arbitrator.[14]

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[14] Letter of Marc De Leeuw to Hon. Stephen J. Bernstein, Oct. 24, 2002, 1-2 (emphasis omitted).

The state court accepted Oxford's contention, ordering that "all procedural issues including, but not limited to, the determination of class certification, shall be resolved by the arbitrator." J.A. 26.

Likewise, in the proceedings before the arbitrator, Oxford repeatedly insisted that it was for the arbitrator to determine whether the agreement authorized a class action. At an early conference "[t]he parties in this case ... agreed that [the arbitrator] should proceed to make the determination." J.A. 30. Oxford itself asked the arbitrator to resolve that question by filing a "Motion for an Order That 'Class Arbitration' Is Not Available Under Dr. Sutter's Contract With Oxford."[15] Oxford argued that "the arbitrator should decide the threshold question of whether 'class arbitration' is permitted by the terms of the contract."[16] The state court, Oxford argued, "stated that it had no legal authority to decide that question . . . , and left to the Arbitrator the question . . . . Oxford does not dispute the Arbitrator's authority to decide this question."[17] "[T]he broad authority given to the arbitrator to resolve 'any dispute arising out of this agreement,'" Oxford explained, meant "that the arbitrator has the power to ascertain whether the parties contemplated class arbitration in their agreement—a power that Oxford does not contest."[18]

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[15] Motion for an Order That 'Class Arbitration' Is Not Available Under Dr. Sutter's Contract With Oxford, Aug. 4, 2003.

[16] *Id.*

[17] Oxford's Reply Brief in Further Support of Its Motion For An Order That 'Class Arbitration' Is Not Available Under Dr. Sutter's Contract With Oxford, 5.

[18] *Id.* 5 (emphasis added); *see id*. at 1 (determination of whether the agreement permits class actions is "the Arbitrator's task").

In 2010 *Stolt-Nielsen* explained that *Bazzle* had not decided that the availability of a class action must be submitted to an arbitrator. 130 S. Ct. at 1772. Oxford now understood that it was not required to submit the issue to the arbitrator, noting that this Court in *Stolt-Nielsen* had "suggested that this threshold determination *may* be made by courts, not arbitrators, given that the *Bazzle* judgment was decided only by a plurality."[19] Despite that understanding, rather than seeking to return to court to argue that the class action issue was a question of arbitrability that a court must decide, or reserving its right to wait until the end of the arbitration to advance that argument in court, Oxford chose again to submit the issue to the arbitrator. Oxford filed a motion asking the arbitrator to revisit his interpretation of the arbitration paragraph and to hold that the paragraph did not authorize class actions.[20] Had the arbitrator resolved that motion in Oxford's favor, the company would have been entitled to invoke section 10 to limit any judicial challenge by Sutter to the arbitrator's decision.

(2) As explained above, the FAA only authorizes a court to vacate an arbitral decision in one of the narrow circumstances set out in section 10(a) of the Act; under certain circumstances not relevant here an award may be modified or corrected under section 11. Otherwise, the court "*must* grant . . . an order [confirming the award] unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 . . . ." 9 U.S.C. § 9

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[19] *See* Oxford Health Plans, Inc.'s Motion for Modification of Clause Construction Award, 3 n.6 (emphasis added). Oxford quoted at length the discussion of this issue in *Stolt-Nielsen*.

[20] *Id.*

(emphasis added). This Court has recognized only one other circumstance in which an arbitral award may be challenged in a proceeding under the FAA. If an arbitrator decides a "question of arbitrability," and the parties did not consent to the submission of that issue to the arbitrator, a party under the FAA may obtain in court a de novo determination of that question. That exception does not apply here, as Oxford itself recognizes.

An issue is a question of arbitrability "in the kind of narrow circumstance where contracting parties would likely have expected a court to have decided [it]." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). Questions of arbitrability are "far more limited" than the full range of "gateway" issues that an arbitrator might need to resolve before addressing the merits of a dispute. *Id.* This Court has recognized two such questions of arbitrability: "whether the parties are bound by a given arbitration clause" and whether an arbitration clause "applies to a particular type of controversy." 537 U.S. at 84. This Court has not decided whether the availability of class proceedings is a question of arbitrability, and need not do so in this case,[21] because even an issue that does constitute a question of arbitrability need not be decided by a court if the parties have agreed instead that the question will be submitted to the arbitrator.

> We have recognized that parties can agree to arbitrate "gateway" questions of "arbitrability,"

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[21] In *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452-53 (2003), the plurality concluded that whether an agreement authorizes class arbitration is not a question of arbitrability. Three members of the Court would have concluded otherwise. 539 U.S. at 456-57 (Rehnquist, C.J., dissenting).

> such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy. . . . This line of cases merely reflects the principle that arbitration is a matter of contract.

Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772, 2777 (2010)(footnote omitted).

Thus though a party may resist an action to compel arbitration by asserting that there is an issue of arbitrability that the court should resolve before ordering arbitration, the court must leave such a question to the arbitrator when the parties have agreed to submit it to arbitration. *See id.* Likewise, where a question of arbitrability arises in the course of the arbitration proceeding, a party dissatisfied by the arbitrator's resolution of that question is not entitled to a de novo judicial determination of that issue if that party consented to the determination of that issue by the arbitrator, and thus failed to preserve the issue for later presentation to the court. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 946 (1995).

Here, during the arbitral proceedings in this case, it was Oxford itself that repeatedly asked the arbitrator to decide whether the arbitration paragraph authorized class arbitration. And in the courts below, Oxford relied exclusively on FAA section 10 as the basis for its challenge to the arbitrator's class arbitration determination, with no suggestion that the class arbitration issue was a question of arbitrability subject to de novo judicial decision. In footnote 9 of its brief in this Court, Oxford concedes that it did not preserve any claim of entitlement to de novo review and that no such claim is now before this Court.

> [U]nder *Stolt-Nielsen*'s reasoning, whether parties have agreed to authorize class arbitration is likely a threshold or "gateway" issue of arbitrability that courts should presumptively address or review *de novo*. The issue is not squarely presented in this case because in 2003 the parties here, like those in *Stolt-Nielsen* . . . , understood this Court's decision in *Bazzle* to direct the question whether the arbitration clause permitted class proceedings to the arbitrator at least in the first instance . . . , and Oxford did not argue for *de novo* review on this basis in the lower courts.

Pet. Br. 38-39 n.9. As Oxford acknowledges, it is too late in the day to now contend that the interpretation of the arbitration paragraph was a question of arbitrability that could only be resolved by the court. Oxford long ago agreed, indeed insisted, that the arbitrator should determine whether the agreement authorized class proceedings.

In addition, once this case returned to federal court in 2010 Oxford only challenged the *correctness* of the arbitrator's interpretation of the arbitration provision. Unlike the plaintiffs in *First Options*, Oxford never challenged the arbitrator's *authority* to decide this question. In *Stolt-Nielsen* this Court declined to consider whether the availability of class proceedings is ordinarily a question of arbitrability to be resolved by a court, because the parties there had agreed to submit that issue to the arbitrators and neither party argued that that submission was impermissible. 130 S. Ct. 1772. The same is true here. As in *Stolt-Nielsen*, the only issue before the Court is whether the arbitral decision can be vacated under section 10.

Oxford does not suggest that it is entitled at this juncture to challenge the arbitrator's power to determine whether the arbitration paragraph authorized class proceedings. Rather, Oxford appears to contend that when a duly authorized arbitrator does decide a question of arbitrability properly submitted to him with the parties' agreement, a judicial challenge to such a decision is not limited to the specific grounds set out in section 10 of the FAA regarding ordinary arbitral decisions. Rather, according to Oxford, such a decision must be given special scrutiny by the courts; the correctness of arbitral decisions regarding questions of arbitrability must be subjected to "meaningful," "independent," or "plausibil[ity]" review. And such review is required here, Oxford suggests, because whether a contract authorized class actions is a question of arbitrability and therefore an arbitrator's resolution of that issue, even when agreed to by the parties, requires special judicial scrutiny. Pet. Br. 35-37.

But however significant a question of arbitrability may be (and even assuming arguendo that the availability of class arbitration is a question of arbitrability), once the parties submit such a question to the arbitrator, this Court has squarely held that the arbitrator's decision on that issue is subject only to the same limited section 10 scrutiny that would apply to any other arbitral decision.

> Did the parties agree to submit the arbitrability question itself to arbitration? If so, then the court's standard for reviewing the arbitrator's decision about *that* matter should not differ from the standards courts apply when they review any other matter that parties have

> agreed to arbitrate. . . . That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances. *See, e.g.*, 9 U.S.C. § 10.

First Options, 514 U.S. at 943 (emphasis in original).

Thus, regardless of whether the availability of class arbitration is a question of arbitrability, because the parties submitted that issue for resolution by the arbitrator, and because Oxford did not in the courts below question the arbitrator's authority to determine that issue, the arbitrator's decision in this Court can only be challenged under section 10 of the FAA.

B. The Arbitrator Decided The Case Under The Contract

The arbitrator's decision in this case was based on a construction of the agreement between Oxford and Sutter, and therefore did not "exceed[his] powers" within the meaning of section 10(a)(4).

When the question before arbitrators concerns the interpretation of a contract, arbitrators act within the scope of their powers if "the essence of" the arbitral opinion is based on that contract. "[A]n arbitrator is confined to interpretation and application of the . . . agreement. . . . He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the . . . agreement." *Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960); *see Eastern Associated Coal Corp.*, 531

U.S. at 466 (*quoting Misco*); *Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 36 (1987)(award legitimate so long as it "'draws its essence from the . . . agreement'")(*quoting Enterprise Wheel*).

Whether an arbitrator's decision drew its essence from the agreement in question is determined by the content of that decision, "the arbitrator's words." *Enterprise Wheel*, 363 U.S. at 598. In an analogous situation in *Stolt-Nielsen*, in determining whether the arbitrators there had based their decision (as they should have) on the FAA, federal maritime law or state law, this Court looked to the face of the arbitrator's opinion.

> Had they engaged in that undertaking, they presumably would have *looked* either to the FAA itself or to one of the two bodies of law that the parties claimed were governing, *i.e.* either federal maritime law or New York law. But the panel did not *consider* whether the FAA provides the rule of decision in such a situation; nor did the panel attempt to *determine* what rule would govern under either maritime or New York law . . . . The panel did not *mention* whether any of th[e] decision [it relied on] were based on a rule derived from the FAA or on maritime or New York law. . . . [The panel developed its own common law rule] [r]ather than *inquiring* whether the FAA, maritime law, or New York law contains [such a rule] . . . .

130 S. Ct. at 1768-69 (emphasis added).

The arbitrator's opinions in this case easily meet the *Enterprise Wheel* standard; unlike the arbitrators in *Stolt-Nielsen*, the arbitrator did "look[] to," "consider," and "mention," the governing standard—here the meaning of the contract—and "attempt[ed] to determine" and "inquir[ed into]" what that contract meant. The first arbitral opinion contains an extended discussion of the arbitration paragraph (J.A. 31-32), the agreement as a whole (*id.* 33), the alternate dispute resolution provision in the agreement (*id.* 34-36), and the significance of the provision incorporating the rules of the American Arbitration Association (*id.* 36). The second arbitral decision contained another specific analysis of the language of the agreement, including an analysis of the phrase "no civil action" and the term "all" (*id.* 73-76), as well as an evaluation of the significance of the interpretations of the arbitration provision which the parties had advanced in the earlier state court litigation. Oxford's merits brief in this Court discusses (and criticizes) at length the arbitrator's analysis of the arbitration agreement; Oxford objects that the arbitrator's "textual analysis" was "irrational" and even "contorted." Pet. Br. 26, 31. But Oxford does not deny that the arbitrator's decisions contain precisely the discussion of the relevant material which was fatally absent in *Stolt-Nielsen*.

Oxford suggests that, despite the arbitrator's extensive discussion of the contract itself, he might have actually based his decision on a belief that class actions are highly desirable. "The record in this case *suggests* that the best explanation for the arbitrator's contorted attempts at textual analysis *may* be . . . a policy preference." Pet. Br. 31 (emphasis added). But a court can find that an arbitrator exceeded his authority in construing a contract only if the arbitrator's decision is unambiguously based solely on considerations other than the agreement itself. In *Enterprise Wheel* it was unclear whether the arbitrator had attempted to interpret the agreement, or instead had based his decision solely on certain extraneous legislation. 363 U.S. at 597-98 ("opinion of the arbitrator . . . is ambiguous"). Even under those circumstances, this Court held, the arbitrator's decision had to be enforced.

> A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. Arbitrators have no obligation to the court to give their reasons for an award. To require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions. This would be undesirable . . . .

363 U.S. at 598.

By contrast, in *Stolt-Nielsen* the Court found that the arbitrators had exceeded their powers because the "conclusion [was] inescapable" that they had based their decision solely on public policy considerations, rather than on the proper governing standard. 130 S. Ct. at 1769. Absent such circumstances, however, an arbitrator's decision must be upheld, even though its basis may not be entirely clear.

> [T]he arbitrator's award settling a dispute with respect to the interpretation . . . of a[n] . . . agreement must draw its essence from the contract . . . . [B]ut as long as the arbitrator is even *arguably* construing or applying

> the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

Misco, 484 U.S. at 38 (emphasis added). As Oxford itself pointed out in opposing Sutter's own section 10(a)(4) action, "'a reviewing court should presume that an arbitrator acted within the scope of his or her authority' and . . . 'this presumption may not be rebutted by an ambiguity in a written opinion.'" (*quoting Metromedia Energy , Inc. v. Enserch Energy Services, Inc.*, 409 F.3d 574, 581 (3d Cir. 2005))(ellipsis added).[22]

Throughout this litigation Oxford has questioned the arbitrator's motives. In the district court Oxford argued that the arbitrator would have paid more attention to Oxford's evidence if he "was actually desirous of determining the parties' intent." Pet. App. 15a. In the court of appeals Oxford asserted that the arbitrator's interpretation of the text of the arbitration paragraph was merely a "pretext." Pet. App. 14a-15a. In this Court Oxford suggests that some covert policy preference "provides the most apparent explanation for the arbitrator's decision." Pet. Br. 13.[23] The evidence of such an improper motive,

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[22] Reply Brief in Further Support of Oxford's Motion to Dismiss the Verified Complaint, 6.

[23] *See also* Pet. Br. 32 ("when this arbitrator concluded that the parties' arbitration clause 'must have been intended to authorized class actions' ([Pet. App.] 48a), that conclusion was driven largely if not entirely by his policy view concerning what procedural options Sutter ought to have"; suggesting that the arbitrator was not "faithfully enforcing the arbitration agreement

Oxford suggests, is to be found in the arbitrator's resort to "contorted" reasoning. *Id.* 31. But section 10(a)(4) does not authorize courts to conduct an investigation into the subjective motives of an arbitrator.[24] If an inquiry into an arbitrator's motives could be grounded merely on asserted defects in an arbitrator's reasoning, virtually any arbitral decision would be subject to attack as a mere subterfuge concocted by a dissembling arbitrator. This Court warned long ago that courts must not "treat the arbitrator as guilty of corrupt partiality, merely because their award is not such an one as the chancellor would have given. We are all too prone, perhaps, to impute either weakness of intellect or corrupt motives to those who differ with us in opinion." *Burchell v. Marsh*, 58 U.S. 344, 350 (1854).

III. OXFORD'S ARGUMENTS FOR EXPANDING REVIEW OF ARBITRATORS' DECISIONS ARE INCONSISTENT WITH THE FEDERAL ARBITRATION ACT

A. Judicial Review of An Arbitrator's Decisions Is Limited To The Circumstances in Section 10

Oxford maintains that federal courts must provide redress in at least some cases in which an arbitrator has erred. It is unclear, however, whether Oxford contends that judicial consideration of such asserted errors should be available regarding all arbitrator errors, only serious

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that the parties before him actually made"), 39 (the arbitrator merely "purported to construe the parties' agreement").

[24] Oxford did not challenge the award under section 10(a)(2), on grounds of "evident partiality," or under section 10(a)(3), for "misbehavior by which the rights of any party have been prejudiced."

errors, only errors regarding particular issues, or only errors in favor of claimants. Oxford does not appear to contend that whenever arbitrators make mistakes they have ipso facto "exceeded their powers" within the meaning of section 10(a)(4). Rather, Oxford seems to argue more broadly—and vaguely—that "meaningful review" or "judicial policing" would further "the purpose of the FAA." Pet. Br. 37.

The simple answer to this argument is that "the nonplenary grounds for judicial review in § 10 of the FAA are exclusive." *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2781 (2010); *see Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584 (2008) ("§§ 10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur and modification"). Federal courts have no authority to add to the narrow list of circumstances in which Congress thought it appropriate to authorize vacatur of an arbitral decision.

The finality that is the cornerstone of arbitration would be fatally undermined if disappointed parties could obtain judicial consideration of whether arbitrators, although acting within their powers, had made some category of error, however that category might be defined. Judicial efforts to delineate the types of errors that could be corrected by a court would spawn a generation of litigation. At a time when arbitrators are deciding individual claims that often involve millions (and sometimes billions) of dollars, claimants and respondents alike would have every reason to attempt to persuade federal judges that their cases involved errors sufficiently serious to warrant judicial intervention. The stakes in many arbitration cases—and not only or predominantly in class actions—are simply too great to expect litigants to do anything else.

The mere prospect of some type of merits based judicial review would alter the nature of the arbitration process itself. As the American Arbitration Association warned in *Hall Street*,

> facing the prospect of enhanced judicial scrutiny, arbitrators will feel obliged to conduct arbitration in a manner similar to traditional litigation. For instance, arbitrators are likely to demand more formalized evidentiary procedures and findings of fact, and feel compelled to create a record and a reasoned decision that will withstand court review. In turn, in the absence of a reasoned decision and complete and interpretable record, a district court tasked with applying a more searching legal or factual review of an arbitrator's award will likely demand more thorough briefing and submissions from the parties, which could effectively mean re-trying issues already decided by the arbitral tribunal.

Brief of Amicus Curiae American Arbitration Association in Support of Affirmance, 8.

B. Oxford Offers No Sound Basis for Permitting Non-Section 10 Judicial Review of the Correctness of An Arbitrator's Award

Oxford offers several justifications for judicial review of the correctness of an arbitrator's decision. None provides a persuasive basis for disregarding the narrow limits in section 10.

Oxford contends that meaningful judicial review would encourage use of arbitration.

> Effective judicial checks are . . . essential to provide contracting parties with the confidence to entrust their disputes to arbitration. If they do not believe that such checks will be applied effectively if and when needed, parties will have a "'drastically reduced'" willingness to enter into arbitration agreements in the first place. *AT&T Techs.*, 475 U.S. at 651.

Pet. Br. 36. The petitioner in *Hall Street* advanced the same argument.[25] It is possible that judicial scrutiny of the correctness of an arbitrator's decisions might be attractive to some parties considering arbitration (particularly parties who thought they might lose in arbitration); but the prospect that the availability of judicial review would lead to increased post-arbitration litigation would also undermine the finality that for many parties is the most attractive aspect of arbitration. Which result is more likely, or more desirable, is not a matter for this Court to decide: Congress already made its choice in the FAA when it limited review to the narrow grounds specified in section 10. Thus in *Hall Street* this Court refused to express a view on the policy debated about whether judicial review of the correctness of arbitral decisions would increase use of arbitration (because the parties would have more confidence that arbitrator errors would be corrected) or decrease arbitration (because arbitration would be more likely to be followed by time-consuming and expensive appeals). 552 U.S. at 589. "We do not know who, if anyone, is right, and so cannot say whether [*Hall Street's*] reading of the statute is more of a threat to the popularity of arbitrators or to that of courts. But whatever the consequences of our holding, the statutory text gives us no business to expand the statutory grounds." 552 U.S. at 589.

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[25] Brief for Petitioner, No. 06-989, 38-40.

Oxford also argues that judicial review of arbitration decisions is essential because there is a considerable danger that arbitrators will be biased. Petitioner warns that there are issues "on which arbitrators may have strong policy views that they may find difficult to put aside." Pet. Br. 37. But that objection is not cognizable under section 10(a)(4). Oxford did not challenge the award in this case under section 10(a)(2), which which permits a court to vacate an award where there was "evident partiality . . . in the arbitrators." 9 U.S.C. § 10(a)(2). The procedures of the American Arbitration Association and other organizations, however, provide the parties with effective tools to assure the selection of an unbiased arbitrator, and the parties are free to craft any additional procedures they please to guarantee that result.

More specifically, Oxford argues that:

> arbitrators—unlike judges—are compensated by the parties before them, typically based on the time devoted to resolving a particular matter. They thus have a direct, inevitable, and significant financial interest in decisions . . . [that] will substantially increase the length and scope of the proceedings.

Pet. Br. 37-38. Importantly, Oxford's purported concern is in no way limited to class actions. If such conduct by arbitrators were indeed a problem, it would occur most often when a respondent filed a dispositive motion (such as a motion to dismiss on limitations grounds) that if granted would terminate the proceedings, and thus end the compensation to the arbitrator; those motions are common in non-class actions. Parties concerned about that risk can minimize any undesirable incentives by selecting an arbitrator who is sufficiently in demand, as an arbitrator or as an attorney, that his or her income would not depend on how long any particular arbitration proceeding lasted, or by providing that a different arbitrator decide such dispositive issues. Of course, a respondent could still argue that there was a risk that arbitrators would prolong the arbitral process because they found the subject matter particularly fascinating or the lawyers especially skillful. But the textual guarantee of finality cannot be disregarded on that basis. Congress enacted the Federal Arbitration Act, not because it regarded arbitration as a dangerous bias-prone process in need of "judicial policing," but because it wanted to permit parties to select *final* binding arbitration where they concluded it was in their interest to do so.

Oxford also insists that judicial review of the merits of arbitral decisions is essential to protect "the promise of *Stolt-Nielsen.*" Pet. Br. 35. But the FAA was adopted to codify, not overturn, the well-established rule that a court has no authority to correct an arbitrator's asserted errors, even when those errors concern statutory or legal commitments of great significance. Arbitrators who hear claims under Title VII of the Civil Rights Act, for example, are entrusted with keeping the nation's promise of racial non-discrimination, a commitment memorialized in three constitutional amendments and rooted in the great issues that gave rise to the Civil War. Arbitrators who decide securities claims by investors who may have lost their life savings are responsible for keeping the promise of the federal securities laws, adopted to prevent a recurrence of a series of economic collapses, from the latest of which the country has yet to fully recover. If arbitrators are to be accorded the responsibility for keeping national promises of such singular importance, they can be trusted as well to take seriously their responsibilities to heed this Court's interpretations of the FAA.

C. Oxford Fails to Offer A Coherent Standard of Non-Section 10 Judicial Review

It is unclear what standard Oxford is proposing courts should use in reviewing the correctness of an arbitrator's decisions.[26] Oxford offers several different approaches, with significant variations within each. And in some passages petitioner suggests the Court simply announce that the arbitrator's decision was sufficiently unsound to require vacatur, and leave for another day the fashioning of an actual standard that courts would apply in reviewing a challenge to the correctness of a decision.

At one end of the spectrum, Oxford asserts that "the arbitrator exceeded his powers by imposing class arbitration in the absence of actual authorization by the parties." Pet. Br. 33 (capitalization omitted). To apply that standard, a court would have to decide de novo what the parties had "actual[ly] authoriz[ed]," i.e. the meaning of the contractual provision at issue. That approach would apply in any case in which a party contended that the parties in their contract did not "actual[ly] authoriz[e]" an order that an arbitrator "impos[ed]." The standard could be invoked, for example, whenever a party objected that the contract at issue did not authorize the arbitrator to impose an award of punitive damages, to direct discovery, or to provide any relief for a claim. Elsewhere in its brief petitioner describes the role of the courts as "judicial . . . policing." *Id.* 14. This formulation suggests that there is a substantial danger that arbitrators will deliberately issue unsound awards, a problem that would warrant especially vigilant judicial scrutiny of arbitral decisions, de novo review with an attitude.

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[26] One thing that is clear is that Oxford does *not* ask this Court to apply the "manifest disregard" standard that has been utilized by some lower courts. This Court has twice declined to decide whether the FAA authorizes or permits courts to use such a standard, and need not do so in this case. *See Stolt-Nielsen*, 130 S. Ct. 1768 n.3; *Hall Street Associates*, 522 U.S. at 584-85; Pet. App. 27a n.3.

On several occasions Oxford calls for "meaningful review" of the correctness of an arbitrator's decision. Pet. Br. 34. This is not in itself a substantive standard, but is merely vaguely descriptive of the level of scrutiny that courts should apply. It seems to suggest that the courts should double-check the decisions of arbitrators with sufficient care that at least most (but not necessarily all) arbitrator errors will be corrected by the courts. Other passages insist that the review must be "independent," suggesting that judges should not give any weight to the arbitrator's view of the evidence or understanding of a contract. *Id.* 11 ("meaningful independent review"), 38 ("meaningful degree of independent review").

Oxford also proffers what appears to be a substantive standard. An arbitrator's order under a contract, it insists, must have a "contractual basis." Pet. Br. 14, 15.[27] Often this phrase appears with a limiting adjective, such as "sound" (*id.* 21), "specific" (*id.* 28), "legitimate" (*id.* 33), "plausible" (*id.* 34), or "proper" contractual basis (*id.* 38). It is unclear whether these passages mean (a) that a court must find that an order was authorized by the contract (that would require a de novo interpretation of the contract), (b) that a court must find that the arbitrator's interpretation of the contract had at least some support in the contract (a standard perhaps analogous to the requirement under the Administrative Procedure Act that an agency decision be supported by substantial evidence), or (c) that the arbitrator's decision must on its face be based on an interpretation of the contract (that would be the traditional interpretation of section 10(a)(4), *see* pp. 18-25, *supra*). It is unclear how the adjectives "sound," "specific," "legitimate" or "plausible" refine this standard.

In yet a fourth variant, Oxford asserts that courts must determine whether the arbitrator's decision was "plausible" (*id.* 13, 14, 33), requiring courts to assess the "soundness of th[e] reasoning" of the arbitrator (*id.* 11). This seems to propose a standard similar to the requirement in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), that there be enough support for a contention that a court could reasonably infer that a particular conclusion is correct.

It is unclear whether Oxford's proposed standard, whatever it might be, would apply in all or only in certain cases. The justifications adduced by petitioner for judicial review of the correctness of an arbitral decision have different implications. Insofar as Oxford contends that judicial review would encourage more widespread use of arbitration, any judicial review standard should logically apply to all arbitral decisions. On the other hand, if judicial review were based on Oxford's contention that arbitrators might be biased in resolving a particular issue by the hope that a decision prolonging the arbitration would result in greater arbitral fees, judicial review would only be warranted in certain types of decisions (e.g., decisions whether to dismiss or hold hearings on claims), and then only if they increased (rather than lowered) the arbitrator's potential fees. For example, judicial review would be required if an arbitrator denied a motion to dismiss on statute of limitations grounds, but not if the arbitrator granted such a motion. Oxford's assertion that "meaningful judicial oversight is particularly important in the context of class arbitration," (*id.* 37), suggests that the level of judicial scrutiny should vary depending on what issue the arbitrator decided, and perhaps on which side prevailed. Oxford does not, however, explain how this would work or specify what standard the lower courts would use to determine the other types of situations in which "judicial oversight is particularly important."

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[27] Elsewhere Oxford states that courts must "ensure that an arbitrator has a legal basis" for his determination. Pet. Br. 39. That principle would extend beyond disputes about the proper construction of a contract.

Finally, Oxford suggests the Court could simply hold that the arbitrator's reasoning is "unsustainable under any standard of review." Pet. Br. 12; *see id.* 39 ("the arbitrator's stated reasoning here is so deficient that it cannot be sustained under *any* meaningful standard of review)(emphasis in original). If the Court were to vacate the award in that manner, it would commit federal and state courts administering the FAA to scrutinizing the correctness of arbitral decisions without any guidance from this Court, and leave for the years ahead all the issues that would raise regarding what the standard of judicial review will be and when it will apply.

IV. THE ARBITRATOR PROPERLY CONCLUDED THAT THE ARBITRATION PARAGRAPH AUTHORIZES CLASS ARBITRATION

For the reasons set out above, the arbitrator's interpretation of the arbitration paragraph did not exceed his powers, and the correctness of that interpretation is not subject to judicial review under any of Oxford's proffered standards. Even if the arbitrator's interpretation of the contract were reviewable, however, it was correct.

(1) The foundation of the arbitrator's decision was his conclusion that the scope of the no civil-action-provision and the scope of the mandatory arbitration provision were the same. Because the no-civil-action provision applied to class claims—and the state judge in response to Oxford's motion had indeed dismissed the class claims as well as the individual claims—the arbitrator concluded that the mandatory arbitration provision must require, and thus permit, arbitration of those same claims. J.A. 31-32, 73-76.

Oxford insists that the arbitrator's premise that the two provisions are co-extensive "cannot survive even cursory analysis." Pet. 22; *see* Pet. Br. 25. But the arbitrator's interpretation of the relationship of the two provisions was precisely the interpretation that Oxford itself advanced in the state court proceedings. *See* pp. 4-6, *supra*. The arbitrator knew that Oxford had done so, because the state court transcript containing Oxford's explanation of the overlap of the two provisions was part of the record before him. An arbitrator who adopts a party's own interpretation of a contract cannot be faulted in subsequent litigation after the party decides to change its position.

Moreover, Oxford never disavowed in proceedings before the arbitrator its position that the two provisions are co-extensive, and certainly did not in those proceedings affirmatively advance its current contention that the no-civil-action clause is broader than the mandatory arbitration clause. Oxford's failure to do so was entirely understandable. Oxford knew in 2003 that if it argued otherwise Sutter could point to the state court transcript and could add to the record the similar representations Oxford had made in its state court briefs. Indeed, had Oxford in the 2003 (or 2010) arbitration proceedings disavowed the representation it had made in state court, Sutter might well have had a basis for reopening the state-court class action.[28]

Oxford's failure to argue to the arbitrator the reading of the contract that it now advances precludes it from challenging the arbitrator's decision on that basis. "Parties to arbitration proceedings cannot sit idle while an arbitration decision is rendered and then, if the decision is adverse, seek to attack the award collaterally on grounds not raised before the arbitrator." *United Steelworkers of America v. Smoke-Craft, Inc.*, 652 F.2d 1356, 1360 (9th Cir. 1981).

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[28] During a 2004 arbitral hearing Oxford's counsel observed that "if your Honor rules that a class is not certifiable, then Mr. Katz may very well choose to go into New Jersey Supreme Court. That would be his choice." Transcript of Proceedings, Oct. 29, 2004, 34.

(2) The arbitrator's opinion rested on what he correctly perceived to be the interpretation of the arbitration paragraph that was implicit in Oxford's use of that paragraph to attack Sutter's state court class claims. Oxford's invocation of the paragraph in this manner necessarily assumed that both provisions applied to the class claims. "[I]f the clause cannot permit Dr. Sutter's court class action to go to arbitration, then Dr. Sutter's original class action must be outside of the arbitration agreement altogether. Oxford would have to have misled the New Jersey court, and the court class action should be reinstated." J.A. 75.

The arbitrator's analysis reflects a sound understanding of the parties' agreement in the context of the Federal Arbitration Act. Section 2 of the FAA provides that agreements to arbitrate are generally valid, and section 4 authorizes federal district courts to "direct the parties to proceed to arbitration" of arbitrable claims. Section 3 provides that a court shall stay proceedings regarding any issue "referable to arbitration." Thus incidental to an order directing parties to arbitrate a claim, a court will stay proceedings regarding that claim; in some instances, as here, courts dismiss such claims.[29] As Oxford observes, arbitration agreements sometimes contain provisions intended to make clear that the particular claims that go to arbitration will not be heard in court.

But none of these provisions of the FAA applies to a promise not to sue over certain claims if that promise is *not* tied to a congruent provision requiring arbitration of those claims. A "naked" no-civil-action provision is simply outside the scope of the FAA. If the contract between Sutter and Oxford had only forbidden Sutter to bring a class action, and had contained no arbitration provision at all, the FAA would have had nothing to say about that prohibition. New Jersey could have declared that prohibition invalid, and the FAA would have provided no basis for staying (or dismissing) a class action in state court. The FAA is similarly inapplicable to a non-arbitrable claim, or to an agreement not to enforce such a claim, even if it happens to be contained in the same complaint as an arbitrable claim that is subject to the FAA.[30]

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[29] This Court need not decide in this case whether the FAA authorizes or permits such dismissals.

In the instant case, if (as Oxford now contends) the mandatory arbitration provision applied only to Sutter's individual claims, but not to the state court class claims, the no-civil-action provision would have been, with regard to the class claims, a naked civil action bar, wholly outside the scope of the FAA. The state court would have had no authority under the FAA to stay or dismiss the class claims; rather, after staying or dismissing Sutter's individual claims, that court would have had to make a separate evaluation under New Jersey law as to whether Sutter could continue to represent a class even though his own individual claims were being resolved in another

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30. Where a civil action contains two claims, only one of which is arbitrable, the arbitrable claim alone is subject to the FAA. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985); *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 20 and n.23 (1983). Section 3 of the FAA requires that proceedings regarding the arbitrable claim be stayed, but the FAA itself says nothing about how the remaining claim is to be treated. Courts would apply non-FAA federal or state law standards in deciding how to handle that remaining claim.

forum.[31] That is why the arbitrator correctly recognized the inconsistency between the state court's dismissal of the class claims and Oxford's insistence that the mandatory arbitration provision did not apply to the class claims. The dismissal, obtained by Oxford under the FAA, of the state court class claims could have been correct only if the mandatory arbitration provision itself *did* apply to those claims. The arbitrator thus fairly concluded that Oxford's reliance on the arbitration paragraph in its 2002 challenge to Sutter's state court class action claims represented "Oxford's original interpretation of what the clause mean[t]." J.A. 74 n.2.

The reasonableness of that conclusion is confirmed by the manner in which Oxford even in this Court describes the relationship between the no-civil-action provision and the mandatory arbitration provision. Oxford repeatedly states that the function of the no-civil-action provision was to exclude from court the very claims there were to be arbitrated.[32] In its merits brief Oxford explains that "[t]he wording of the arbitration clause is wholly unremarkable, banning litigation of disputes in court and instead referring *them* to arbitration." Pet. Br. 12-13 (emphasis added). In its petition reply brief Oxford explained that "[b]road 'any dispute' arbitration provisions may be phrased in different ways, but they have a common gist: *All* disputes go to arbitration, not to court." R. Br. for Pet., 4 (emphasis added). But if that is correct, the arbitrator properly concluded that because (as Oxford itself had argued in state court) the no-civil-action provision precluded litigation of the class claims in state court, the mandatory arbitration provision necessarily applied to those claims as well.

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[31] Construing Federal Rule of Civil Procedure 23, the Third Circuit has held that "[s]o long as a class representative has a live claim at the time he moves for a class certification, neither a pending motion nor a certified class action need be dismissed if his individual claim subsequently becomes moot." *Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124,135-36 (3d Cir. 2000)(opinion joined by Alito, J.). New Jersey courts treat federal cases as persuasive authority in construing the state class action rules. In this case Sutter moved for class certification in September, 2002, and the state court did not dismiss his claims until October 25, 2002.

[32] Inconsistent with the passages quoted above, Oxford also states that the purpose of the no-civil-action provision was simply to make clear that the *non*-class claims being referred to arbitration could not be pursued in court. Pet. Br. 23-24. But

(3) Oxford also argues that it does not matter whether the no-civil-action and mandatory arbitration provisions are co-extensive, because "a class action is not a special 'form[] of civil action' (Pet. App. 48a), . . . [but] a procedural device . . . to resolve multiple individual disputes at the same time." Pet. Br. 25. This argument was not advanced by Oxford in any of its briefs in the arbitration, and cannot be raised in this Court for the first time. It is also incorrect. Lawyers and non-lawyers alike use the phrase "class action" to refer to a *lawsuit* in which a plaintiff seeks to represent a class. That is why the term "action" (not "procedural device") appears in the phrase "class action." A lawsuit in which the plaintiff seeks to represent a class is a class *action*; a motion for class certification would be a *procedural* issue. *See* J.A. 26.

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if that is correct it is impossible to understand how the no-civil-action provision could have been applied to the class claims under the FAA; there would have been no basis in the FAA for Oxford's attack on the state court class claims or for staying or dismissing those claims.

(4) The arbitrator commented in his 2003 opinion that it would be surprising if the no-civil-action provision applied to class claims, but the mandatory arbitration provision did not. J.A. 30-32. That observation simply reiterated the arbitrator's recognition that, as Oxford itself had argued, the two provisions were interrelated and, consistent with the FAA, provided that the claims that could not be litigated were the same claims subject to arbitration. This passage does not, as Oxford contends, constitute some sort of endorsement of class proceedings as particularly desirable. Unlike the arbitration panel in *Stolt-Nielsen*, the arbitrator did not suggest that "class arbitration is beneficial in 'a wide variety of settings.'" 130 S. Ct. at 1769.

Nor did the arbitrator hold, as Oxford insists, that the mere existence of a broad provision for arbitration is sufficient to warrant an inference that an agreement authorizes class arbitration. Oxford rests this assertion on the arbitrator's comment about the unique breadth of the language of the agreement. The wording of the mandatory arbitration provision, Oxford insists, is not at all unique, but simply a standard provision directing that disputes be resolved in arbitration. Pet. Br. 22-23. But the arbitrator's comment about the breadth of the agreement language refers to the wording of the introductory no-civil-action provision, not on the language of the mandatory arbitration provision.

> The clause is much broader even than the usual broad arbitration clause. The introductory phrase, "No civil action concerning any dispute arising under this agreement shall be instituted before any court," is unique in my experience and seems to be drafted to be as broad as can

> be. "No civil action" must mean no civil action of any kind whatsoever. The clause prohibits civil actions in law, equity, admiralty or even probate. No such action shall be instituted in "any court." Any court includes any Federal or State Court, any foreign court or the Court at the Hague. Taken together, this phrase has the effect of prohibiting any conceivable court action concerning any dispute under the Agreement. It would not be possible to draft a broader or more encompassing clause.

J.A. 31.

The arbitrator did not hold that authorization of class arbitration can be inferred merely from the absence of an express prohibition against such proceedings. The arbitrator reasoned only that the absence of any express provision regarding class actions was significant in this particular case because he had concluded, consistent with Oxford's own statements about the meaning of the agreement, that the no-civil-action provision (which does apply to class actions) was co-extensive with the mandatory arbitration provision (whose meaning was at issue).

> [B]ecause all that is prohibited by the first part of the clause is vested in arbitration by its second part, I find that the arbitration clause must have been intended to authorize class actions in arbitration. Indeed, to avoid a finding that such was the parties' intention, it would be necessary for there to be an express exception for class actions in the [no-civil-action] prohibition.

J.A. 32. The arbitrator did not suggest that the absence of such an express prohibition against class actions in arbitration would have been probative, still less decisive, in the absence of the interconnection between the no-civil-action provision and the mandatory arbitration provision.

The arbitrator's decision was correct. But even if this Court would decide the matter differently, there is no question that his decision was arguably based on an interpretation of the contract, which is all that section 10(a)(4) requires.

CONCLUSION

For the above reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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REPLY
BRIEF

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IN THE
Supreme Court of the United States

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v.
JOHN IVAN SUTTER, M.D.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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REPLY BRIEF FOR PETITIONER

In *Stolt-Nielsen*, this Court held that "[a]n implicit agreement to authorize class-action arbitration ... is not a term that [an] arbitrator may infer solely from the fact of the parties' agreement to arbitrate." *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010). Here, Sutter points to no express language in the parties' contract agreeing (or even referring) to class arbitration; no extrinsic evidence that the parties ever agreed to or contemplated class proceedings; and no background default rule that it might be argued the parties adopted by choosing not to contract around it. His case rests solely on the ground *Stolt-Nielsen* forbids: a general arbitration clause, indistinguishable from any other provision requiring arbitration of "any" or "all" disputes. Under *Stolt-*

Nielsen, that cannot be a sufficient "contractual basis" for concluding that the parties "*agreed to authorize* class arbitration." *Id.* at 1775-1776 & n.10.

Sutter insists (*e.g.*, Br. 20) that the arbitrator here was authorized to interpret the parties' agreement; that he construed it as "intended" to authorize class arbitration; and that a court applying the Federal Arbitration Act may not overrule that determination unless, as in *Stolt-Nielsen*, the claimant's lawyer actually "stipulates" that the parties never really came to any such agreement. In *Stolt-Nielsen* too, however, the parties had expressly directed their arbitrators to determine whether their agreement permitted class arbitration, *see* 130 S. Ct. at 1765, 1772 n.8; and this Court fully recognized the "high hurdle" that the defendants faced in seeking FAA review, *id.* at 1767. The Court nonetheless held that the arbitrators there had "exceeded their powers" within the meaning of 9 U.S.C. § 10(a)(4) by seeking to impose class proceedings based on nothing more than a general arbitration clause. If that decision is to have any continuing force, its reasoning must lead to the same result here.

I. IF THE UNDERLYING FACTS WERE RELEVANT, THEY WOULD FAVOR OXFORD

Sutter begins his brief (at 1-3) with a summary of his underlying claims. Although the merits of those claims are irrelevant to the question presented, Sutter's faulty account of the situation warrants a brief response.

Sutter accuses health insurers of using various practices, "concealed" (Br. 2) in computer programs used to review claims, to short-change physicians who have provided services to patients under the insurers' plans. When physician claims are examined, however, it often turns out that individual providers or their offices have made mistakes in submitting their claims, or sometimes that their submissions reflect waste, fraud, or abuse. In the federal Medicare and Medicaid programs, for example, improper payments resulting from mistaken or fraudulent coding, billing, or other practices ran to more than $70 billion in fiscal 2010.[1] Accordingly, responsible parties such as Oxford have developed automated systems to process claims efficiently while finding and correcting billing and coding problems, whether inadvertent or intentional.[2]

When either claim submissions or payment decisions are questioned, the resulting discussions or disputes turn on particular facts. As the Eleventh Circuit explained, for example, in the course of decertifying a class in litigation involving state-law claims similar to Sutter's, "each doctor, for each alleged breach of contract (that is, for each alleged underpayment), must prove the services he provided, the request for reimbursement he submitted, the amount to which he was entitled, the amount he actually received, and the insufficiency of the HMO's reasons for denying full payment." *Klay* v. *Humana, Inc.*, 382 F.3d 1241, 1264 (11th Cir. 2004); *see id* at 1268 (decertifying class). The fact-specific nature of these claims makes them unsuited to class proceedings. They are, on the other hand, well suited for handling through the complaint resolution process prescribed in Oxford's physician provider agreements (*see* JA 20), or if necessary through bilateral arbitration (*see* JA 15-16).[3]

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[1] *See* U.S. Gov't Accountability Office, Highlights, *Medicare and Medicaid Fraud, Waste, and Abuse* (Mar. 9, 2011), *available at* http://www.gao.gov/assets/130/125652.pdf.

[2] The federal government has been an active proponent of such systems. *See generally, e.g.*, Office of Inspector General, Dep't of Health & Human Servs., *Medicare's National Correct Coding Initiative* i-ii (Sept. 2003), *available at* https://oig.hhs.gov/oei/reports/oei-03-02-00770.pdf. Sutter's amicus the American Medical Association points to "modifier 25" as one claim code that Oxford has supposedly "automatically and improperly denied." AMA Br. 10. Notably, when the government studied providers' use of that code, it concluded that "[t]hirty-five percent of claims using modifier 25 that Medicare allowed in 2002 did not meet program requirements, resulting in $538 million in improper payments." Office of Inspector General, Dep't of Health & Human Servs., *Use of Modifier 25*, at i (Nov. 2005), *available at* http://www.healthlawyers.org/SiteCollectionDocuments/Content/ContentGroups/News1/Health_Law_Documents_ASK_/20052/oei-07-03-00470.pdf.

The present case should have been a relatively simple one about whether Oxford should have paid Sutter more or less for particular services he claimed to have rendered under the provider agreement. *See* Sutter Br. 3. Instead, Sutter sought, and the arbitrator imposed, class arbitration procedures to which the parties never agreed. That the case has now entered its second decade is a stark confirmation of this Court's observation that "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1751 (2011).

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[3] Sutter hints in passing (Br. 2) that class procedures are necessary to give physicians any practical means to bring such claims. His amicus makes the argument at length. AMA Br. 8-13, 28-30. But the arbitrator never suggested that he was ruling on this basis. *See, e.g.*, Oxford Br. 4-9 (describing opinions). Had he done so, his ruling would have been even more clearly based on impermissible policy considerations. *See* Oxford Br. 31; *cf. AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1753 (2011). Moreover, the record shows that, while claims vary in size, if the practices Sutter complains of were illegitimate (which they are not) then some physicians would have claims for hundreds of thousands of dollars. *See* Lathrop Aff. ¶ 4, No. 2:06-cv-02198, Dkt. No. 13-1 (D.N.J. May 31, 2006). While Sutter now says (Br. 2) that his own losses amounted to $1,000 per year (or $8,000 over the putative class period), that calculation appears to exclude more substantial damages Sutter sought earlier in the arbitration. And the AMA's analysis fails to acknowledge that the arbitration clause here allows the arbitrator to allocate all costs and expenses, including attorneys' fees, between the parties at his discretion. JA 16.

II. ARBITRATORS EXCEED THEIR POWERS BY IMPOSING CLASS ARBITRATION BASED ON NOTHING MORE THAN A GENERAL ARBITRATION CLAUSE

A. *Stolt-Nielsen* Establishes That Section 10 Permits Relief For Parties, Such As Oxford, That Have Been Involuntarily Forced Into Class Arbitration

1. Sutter builds his response largely around the proposition that Oxford is asking this Court to depart radically from established principles of judicial review under the FAA. *See* Sutter Br. 18-25, 38-48. That is not correct. Review under Section 10 is properly limited, and courts generally will not disturb decisions made by arbitrators within the scope of the powers the parties have conferred upon them. In *Stolt-Nielsen*, however, this Court recognized that even the "high hurdle" of Section 10(a)(4) review (130 S. Ct. at 1767) is overcome when an arbitrator imposes class arbitration without a sufficient contractual basis—and that such a basis may not be inferred from the mere existence of the arbitration agreement itself.

This case cannot meaningfully be distinguished from *Stolt-Nielsen*. In each case, parties entered into an agreement with a provision mandating arbitration of any or all disputes. 130 S. Ct. at 1765; JA 15-16. In each case, a plaintiff or plaintiffs filed a putative class action in court, and the defendant or defendants successfully moved to compel arbitration. 130 S. Ct. at 1765; Pet. App. 2a-3a. In each case, the arbitration claimant argued that the parties' agreement allowed for class arbitration, despite the lack of any textual reference to class proceedings or extrinsic evidence that the parties ever contemplated or agreed to the possibility of class arbitration. In each case, after this Court's plurality decision in *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003), the parties agreed to allow arbitrators to determine, in the first instance, whether their agreement allowed for class arbitration, and the class issues ultimately proceeded under the structure prescribed by the Supplementary Rules for class arbitration promulgated by the American Arbitration Association after *Bazzle*. 130 S. Ct. at 1771; JA 30.[4] And in each case, the parties made competing arguments concerning how the arbitration clause should be construed to reflect the intent and understandings of the parties. *See, e.g.*, 130 S. Ct. at 1769 n.6 (summarizing evidence of industry custom and usage); Pet. App. 46a-52a.

The only difference between this case and *Stolt-Nielsen* is that in *Stolt-Nielsen* the claimant's counsel freely acknowledged, in oral argument before the arbitrators, that when the parties referred to their arbitration clause being "silent" on the question of class arbitration, they meant "not simply ... that the clause made no express reference" to class proceedings, but that there had been "no agreement ... reached" on that issue. 130 S. Ct. at 1776; *see also* 08-1198 JA 77a. In light of that stipulated lack of actual agreement, the Court held it was necessary to determine what default rule should apply in the absence of an agreement. 130 S. Ct. at 1770, 1772.

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[4] The parties in *Stolt-Nielsen*, whose agreement did not generally call for use of AAA rules, entered into a separate contract expressly directing their arbitrators to address the availability of class arbitration under the framework of the Supplementary Rules. *See* 130 S. Ct. at 1765, 1772 & n.8. Here, the arbitration clause invokes the AAA rules (JA 16), and the Supplementary Rules became applicable when they were adopted in October 2003, shortly after issuance of the arbitrator's initial clause construction award (Pet. App. 43a-53a).

The Court ultimately concluded that, because arbitration is inherently a consensual process, "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." 130 S. Ct. at 1775. Moreover, "[a]n *implicit* agreement to authorize class-action arbitration ... is *not* a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate." *Id.* (emphases added). Noting the conceded lack of any actual agreement in the case before it, the Court held that by imposing class arbitration the arbitrators had "exceeded their powers" within the meaning of Section 10(a)(4), and thus vacated their award. It reached that conclusion even though "the parties' supplemental agreement [had] expressly assigned this issue to the arbitration panel." *Id.* at 1772.

Thus, even applying no more than standard FAA review, an arbitral award imposing class arbitration must be vacated as *ultra vires* unless it rests on a proper contractual basis—*i.e.*, an actual agreement between the parties contemplating the use of class-action procedures in an appropriate case. And an arbitrator may not find such an agreement—as the arbitrator in this case did—based on nothing more than the agreement to arbitrate itself.

2. Sutter argues that he has not "stipulated" that his agreement with Oxford is "silent" as to class arbitration (Br. 20-21); that Oxford agreed to allow the arbitrator to construe the arbitration clause in the first instance (Br. 26-33); and that the arbitrator said that he grounded his decision in the language of the parties' agreement (Br. 35-36). None of these points succeeds in avoiding *Stolt-Nielsen*.

If *Stolt-Nielsen* applied only in cases where a claimant concedes, after a dispute has arisen, that the parties never reached any actual agreement to permit class proceedings, this Court's decision would be deprived of any force in proceedings challenging the improper imposition of class arbitration under the FAA. *See Jock* v. *Sterling Jewelers Inc.*, 646 F.3d 113, 129 n.2 (2d Cir. 2011) (Winter, J., dissenting) (*Stolt-Nielsen*'s application cannot turn on a "*sui generis* and idiosyncratic stipulation of the parties" without making it "an insignificant precedent"). If vacatur is not appropriate even where, as here, the lack of any contractual basis is readily apparent from the face of the parties' arbitration clause and the lack of any further evidence of agreement in the record, then class proceedings may be imposed on the basis of any arbitrator's construction of any arbitration agreement, without any judicial check. That is not narrow review, but no genuine review at all.

The parties' submission of the question to their arbitrator in the first instance also does not preclude any review. In *Stolt-Nielsen*, the Court explained that although the "arbitration panel was charged with deciding ... whether the arbitration clause ... allowed for class arbitration, ... nothing in the supplemental agreement conferred authority on the arbitrators to exceed the terms of the [arbitration clause] itself." 130 S. Ct. at 1772 n.8. The same is true here. Nothing gave the arbitrator in this case the power to impose class arbitration without an adequate contractual basis.

Finally, there can be no talismanic significance to an arbitrator's assertion that he has construed the parties' agreement and divined their intent. Here, the arbitrator looked at an arbitration agreement saying, in essence, "We agree to arbitrate, not litigate, all disputes," and concluded the parties "must have ... intended" to authorize class arbitration. *See* Pet. App. 48a. If that conclusion is simply binding on the courts, then it is not clear why Sutter thinks an arbitrator could not likewise declare that parties whose contract specifies the use of New York law must actually have intended to use California law instead. *See* Sutter Br. 19-20. In both instances, the obvious problem is that "merely saying something is so does not make it so." *Stolt-Nielsen*, 130 S. Ct. at 1769 n.7. If courts cannot apply at least that principle in reviewing class-arbitration awards under Section 10(a)(4), there will be little left of "the basic precept that that arbitration 'is a matter of consent, not coercion.'" *Id.* at 1773 (quoting *Volt Info. Scis., Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)).

B. Reversal In This Case Will Not Threaten The Finality Of Arbitration Awards

Sutter argues (Br. 15-16) that vacating the arbitrator's decision in this case would be contrary to FAA principles and would cast doubt on the finality of all arbitration awards. In fact, vacatur will best serve the principles of the FAA.

1. Here, as in *Stolt-Nielsen*, no one questions the limited nature of judicial review under the FAA. And here, as in *Stolt-Nielsen*, the facts before the Court do

not test those limits. Where, as here, an arbitrator has pointed neither to any express language in an arbitration clause authorizing class arbitration nor to any extrinsic evidence or background legal rule bearing on the parties' alleged intent to authorize class proceedings, "the conclusion is inescapable" (130 S. Ct. at 1769) that there is no "contractual basis" for ordering class arbitration (*id.* at 1775), and thus "there can be only one possible outcome" (*id.* at 1770).

Given the regrettable frequency with which arbitrators appear to have "interpreted" bare arbitration clauses to authorize class arbitration, and the Second and Third Circuit decisions refusing vacatur on such facts, simply reversing in this case will provide critical guidance to arbitrators and reviewing courts. *See* Pet. 13-16; Pet. 27-28 & nn.13, 14 (collecting cases); *Smith* v. *Cheesecake Factory Restaurants, Inc.*, 2013 WL 494090, at *2-3 (M.D. Tenn. Feb. 8, 2013); *Opalinksi* v. *Robert Half Int'l, Inc.*, 2012 WL 6026674, at *1 & n.1 (D.N.J. Dec. 3, 2012), *appeal held in abeyance pending decision in this case*, No. 12-4444 (3d Cir.). If cases arise where arbitrators can advance more colorable grounds for concluding that parties *actually agreed* to authorize class arbitration, it may be that courts will defer to arbitral resolution of debatable questions, at least if parties have clearly submitted the question to arbitration or have not sought *de novo* review.[5] Those issues can and should be worked out as they arise in concrete cases. At a minimum, however, judicial review must involve some consideration of the rationale for an award imposing class arbitration in order for a court to apply ***Stolt-Nielsen*** and determine whether arbitrators have exceeded their powers. *See Reed* v. *Florida Metro. Univ., Inc.*, 681 F.3d 630, 646 (5th Cir. 2012). And any such consideration confirms that the arbitrator "exceeded [his] powers" here. *See* 9 U.S.C. § 10(a)(4).

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[5] As Sutter argues at considerable length (Br. 28-33), this case does not squarely present the question whether the availability of class arbitration is a threshold issue of arbitrability that should presumptively be decided (or perhaps reviewed) *de novo* by the courts. There is, however, a substantial argument to be made for that proposition in an appropriate case. *See* Oxford Br. 38 n.9.

2. Sutter argues (Br. 23) that "[p]arties agree to final and binding arbitration ... because they conclude that the risk of error is outweighed by the greater benefits of finality." In the context of class-action arbitration, that argument is astonishingly ironic. As this Court explained in ***AT&T Mobility LLC*** v. ***Concepcion*** (which Sutter does not even cite), "[d]efendants are willing to accept the costs of ... errors in [individual] arbitration, since their impact is limited to the size of individual disputes, and presumably outweighed by savings from avoiding the courts." 131 S. Ct. at 1752. In sharp contrast, "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable." *Id.* Indeed, that is one of the central reasons why, as the Court has observed, it is "hard to believe" that defendants would *ever* agree to class arbitration—"bet[ting] the company with no effective means of review." *Id.* In this context, effective judicial review does not threaten the actual arbitration bargain. On the contrary, it is necessary to preserve the real terms of that bargain, and thus to preserve the willingness of parties to use arbitration at all. *See* Oxford Br. 36-39.

III. THERE IS NO CONTRACTUAL BASIS FOR CLASS ARBITRATION IN THIS CASE

Finally, although Sutter attempts to defend the arbitrator's conclusion on the merits (Br. 48-56), he fails to show how a court applying even the most deferential standard of review could conclude that the arbitrator here had any "contractual basis" for finding that the parties "*agreed to authorize* class arbitration." *Stolt-Nielsen*, 130 S. Ct. at 1776 & n.10.

1. Like the arbitrator, Sutter points to nothing in the language of the parties' arbitration agreement that deals expressly with class arbitration. Nor, like the arbitrator, does he point to any course of dealing, other extrinsic evidence, or applicable background rule even suggesting that Oxford ever affirmatively agreed to authorize potential class proceedings. Like the arbitrator, he relies instead on an inferential analysis based on contractual language that on its face does nothing more than direct all disputes out of litigation and into arbitration.

As to that language, Sutter does not contest that what he terms the "mandatory arbitration provision," which requires arbitration of "all disputes," is simply a variant of standard language common to many arbitration agreements. *See* Oxford Br. 22-23. As Oxford's opening brief explains (at 23-24 & n.4), the accompanying language expressly prohibiting litigation—what Sutter terms the "no-civil-action provision" (Br. 4)—merely reinforces the "mandatory arbitration" language by providing indisputably clear notice of its necessary effect, and thus ensuring its enforceability under state law.[6] Together or separately, the two clauses of this single sentence make one point: All disputes arising under the agreement will go to arbitration, not to court. That amounts to nothing more than the parties "simply agreeing to submit their disputes to an arbitrator." *Stolt-Nielsen*, 130 S. Ct. 1775. And under *Stolt-Nielsen*, such an agreement is not one from which an arbitrator may infer "[a]n implicit agreement to authorize class arbitration." *Id.*

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[6] As Oxford observed (at 23), provisions spelling out the prohibition on court actions are common. They were, for example,

2. Tellingly, Sutter resorts in part to misrepresenting Oxford's previous positions. He argues (Br. 48-49), for example, that Oxford previously advocated the construction of the arbitration provision adopted by the arbitrator—that any type of proceeding barred from court by the first clause of the agreement may be replicated in arbitration under the second. But the statements Sutter relies on, mostly drawn from state court proceedings in 2002, show no such thing. Oxford has never argued that any of Sutter's claims could properly be subject to class arbitration.

Oxford's argument in response to Sutter's original state court complaint was exactly what one would expect: "Sutter ha[d] agreed to arbitrate his disputes with Oxford," and thus could not maintain an action in court. *See* Oxford's Memo. of Law Supporting Motion to Stay and/or Dismiss in Part, at 1, No. ESX-L-6644-02 (N.J. Super. Ct. July 26, 2002). In the course of explaining why both statutory and contractual claims—*not* both "class" and "individual" claims—should be sent to arbitration, Oxford referred to sending Sutter's entire "action" (rather than the parties' "dispute") to arbi-

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part of the agreements here; in the two other federal appellate cases considering the question presented (*id.*); and in *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 595 (1960), which Sutter cites extensively.

tration. Sutter cannot twist counsel's phrasing into some sort of admission that the parties' arbitration agreement authorized class proceedings.[7]

Similarly, Sutter argues that, during a 2004 hearing before the arbitrator on class certification, Oxford suggested that if the arbitrator declined to certify a class then Sutter might have "a basis for reopening the state-court class action." Br. 49 & n.28. Again, Oxford said nothing of the sort. In an addendum to this brief, Oxford has reprinted the relevant portion of the transcript Sutter cites. As is quite clear in context, all counsel noted was that if the arbitrator ruled in Oxford's favor on class certification, under the AAA Supplementary Rules Sutter might choose to return to the state court that had referred the matter to arbitration to file a new proceeding *challenging the arbitrator's decision*—and Oxford could then remove that proceeding to federal court. Add. 4a. Conversely, Oxford argued, if the arbitrator decided to certify a class, Oxford could petition a federal court for review. *Id.* Counsel's point had to do with whether state or federal law would ultimately apply on review of the arbitrator's class certification decision, and therefore what law the arbitrator should apply in the first instance. The entire discussion is utterly irrelevant to the question presented here.

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[7] Indeed, if the Court wishes to consider the parties' positions at that time, Sutter's counsel certainly understood that Oxford was not seeking to have a "class action" or any "class claims" sent to arbitration. *See* C.A. App. 131 (stating that Oxford had brought a "motion to compel *individual arbitration*" (emphasis added)). Indeed, Sutter repeatedly argued that "the relief requested by Oxford"—*i.e.*, dismissal of Sutter's complaint and referral of all claims to arbitration—would thwart New Jersey public policy by requiring "individual arbitrations." C.A. App. 135; *see also, e.g.*, C.A. App. 137 n.8 (arguing that arbitration provision in Oxford provider agreement was "designed to negate [class] actions").

3. On the merits, Sutter's defense of the arbitrator's reasoning reflects a fundamental misunderstanding of the terms of his agreement with Oxford, the question before the Court, and what it means for a plaintiff who has filed a putative class action in court to have his own dispute referred to arbitration.

To begin with, the parties' clause sends to arbitration all "disputes," not all "civil actions." *See* Oxford Br. 25. Any focus on how the clause, by barring *all* court actions, also bars judicial *class* actions, is beside the point.

In any event, Sutter's argument begins with the premise that the rules applicable in most U.S. courts allow a party to begin an action seeking to assert not only his own claims but also, in a representative capacity, the allegedly similar claims of many otherwise absent parties. That is correct, but it is important to focus on the difference between the claims actually or potentially put at issue and the manner in which the forum's rules allow them to be presented. As this Court has explained, a party's "right to assert [its] own claims in the framework of a class action ... is a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guaranty Nat'l Bank* v. *Roper*, 445 U.S. 326, 332 (1980); *see also* Fed. R. Civ. P. 23; 28 U.S.C. § 2072 (federal rules "shall not abridge, enlarge or modify any substantive right"); *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (plurality opinion); *Califano* v. *Yamasaki*, 442 U.S. 682, 700-701 (1979); 1 *Newberg on Class Actions* § 1:1 (5th ed. 2011) (class actions are a "procedural device"). That is why Sutter's original state-court complaint defined a set of substantive legal claims for relief (C.A. App. 164-175), along with a request that the court permit him to litigate those claims both on his own behalf and on behalf of a class of other claimants. Unless and until a class was actually certified, Sutter could act only on his own behalf. He had no power to represent or bind absent members of the putative class. *See Smith* v. *Bayer Corp.*, 131 S. Ct. 2368, 2379-2380 (2011).

Applying the language of the parties' arbitration agreement, the state court sent Sutter's "dispute" with Oxford—*i.e.*, his own set of substantive claims—to arbitration. JA 25-26. Once there, the question became whether in that new forum Sutter could again invoke a procedural mechanism that would allow him to assert allegedly similar claims on behalf of an absent class. The answer to that question is determined by the rules of the arbitral forum—just as if Oxford had removed the case from state to federal court, the availability of class procedures would then have been determined by the applicable federal rules. *See Smith* v. *Bayer Corp.*, 131 S. Ct. at 2382 ("Once removal takes place, Federal Rule 23 governs certification."). And as *Stolt-Nielsen* makes clear, the governing rule in the arbitral forum is that class procedures may not be invoked unless the parties "*agreed to authorize* class arbitration." 130 S. Ct. at 1776.

It is therefore quite correct that the two clauses of the arbitration provision here are parallel and coextensive in their application to Sutter's claims. Any claim Sutter could frame on his own behalf was both barred from court and permitted in arbitration. Nothing in the provision, however, permits Sutter to invoke in arbitration every *procedure* that would have been available in court, including any ability to seek to advance allegedly similar claims on behalf of thousands of absent parties. *See* Oxford Br. 26-27; *Reed*, 681 F.3d at 643 ("[T]he central purpose of the arbitration agreement is to *avoid* ... provisions [such as a state statute permitting certain class actions], not to incorporate them into the arbitration agreement.").

Sutter argues (Br. 51-52) that if "his" class "claims" could not be brought in arbitration, then the New Jersey court was wrong to dismiss them, even as Sutter's own dispute was sent to arbitration. It seems quite unlikely that, as a matter of state procedure, a New Jersey court would have allowed Sutter to continue litigating as a class representative even after his own claims had been sent to arbitration. *See Caudle* v. *American Arbitration Ass'n*, 230 F.3d 920, 921 (7th Cir. 2000) ("[A] contract promising to arbitrate the dispute removes the person from those eligible to represent a class of litigants."). For present purposes, however, the dispositive point is that if Sutter wanted to make that argument, he should have made it to the New Jersey court at the time his suit was dismissed. As the present case comes to this Court, there is no question that Sutter's individual claims were properly referred to arbitration. The question presented is whether, in the arbitral forum, Sutter was entitled to transform his individual dispute into a class proceeding.

Finally, Sutter's argument proves far too much. If Sutter's reasoning were correct, then apparently any arbitration clause would *have* to be read to authorize class arbitration if the plaintiff had first filed a putative class action in court. As Sutter concedes (Br. 50), a "no-civil-action" provision simply makes explicit what is already implicit in any clause requiring the parties' disputes be sent to arbitration—namely, that none of those disputes may form the basis of a suit in court.

Thus if, as Sutter argues (Br. 52-53), comprehensively barring litigation and requiring arbitration of any dispute requires the conclusion that the parties agreed to submit "class claims" to arbitration, then nearly all arbitration clauses would have that meaning. That position cannot be squared with *Stolt-Nielsen*'s prohibition on inferring an intent to authorize class arbitration from the fact of the agreement to arbitrate alone. 130 S. Ct. at 1775-1776.

4. Although Sutter protests to the contrary (Br. 54), the best explanation for the arbitrator's contractual "interpretation" was his expressed belief that Sutter must be able to bring his claims as a class action in some forum, and that a contrary result would be "bizarre." *See* Pet. App. 48a. Sutter's attempt to explain away the arbitrator's candid acknowledgment of his motivation fails. *See* Sutter Br. 54.

As the arbitrator himself said, what he felt was "bizarre" was that the parties' arbitration agreement would "mean that class actions are not possible in any forum." Pet. App. 48a. In effect, the arbitrator accepted exactly the argument that Sutter had made to the state court when he resisted arbitration in the first place: limiting him to individual proceedings would violate public policy. *See, e.g.*, C.A. App. 135; *supra* n.7. Yet, individual resolution is the default position that parties accept when they simply agree to arbitrate their disputes. *Stolt-Nielsen* makes clear that, under the FAA, an arbitrator has no authority to override that default rule and impose class proceedings based on his personal views regarding their desirability. And, as Oxford's opening brief explains (at 31-32), such policy considerations cannot provide the "contractual basis" that *Stolt-Nielsen* requires to permit class arbitration.

Similarly, Sutter cannot avoid (Br. 54-56) the arbitrator's statements regarding the breadth of the parties' arbitration clause and the lack of any express exclusion of class actions. Although the arbitrator recited, after *Stolt-Nielsen*, that he had engaged in "a vital exercise to determine what the parties intended" (Pet. App. 38a), in the end all he had to work with was a broad, general arbitration clause that prohibited litigation, required arbitration, and did not expressly exclude class proceedings. Under *Stolt-Nielsen*, that cannot be enough.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MARCH 2013

ADDENDUM

ADDENDUM

ARBITRATION PROCEEDINGS
AMERICAN ARBITRATION ASSOCIATION

In the Matter of the
Arbitration between

JOHN IVAN SUTTER, M.D., P.A.
on behalf of himself and all
others similarly situated,
Claimant,
-and-

OXFORD HEALTH PLANS, INC.,
Respondent.

AAA Case No . 18 193 20593 02

1633 Broadway
New York, New York
Friday, October 29, 2004
10:36 a.m.

BEFORE:

HON. WILLIAM D. BARRETT

* * *

THE ARBITRATOR: You made a point earlier that if you look to the law of the forum and I'm just saying that I think that you certainly are not going to be looking to New York law.

MR. DE LEEUW: No. When I say "the law of the forum" I mean the law of the AAA and your Honor is absolutely correct, there is not a lot of case law under the AAA and not a lot of backup to the standards.

But I'd say two things about the law of the forum. As your Honor points out, the law of the forum is the AAA. New Jersey precedent may be helpful in that regard. Alaska precedent may be helpful in that regard. What I would say is that there are two reasons why I believe that federal precedent should be binding here.

One, the AAA and this is indisputable, is a national organization and it seeks to have uniform national rule. If your Honor were to interpret Rule 4 according to New Jersey state law, as opposed to federal law, to the extent there were any distinctions—I'm not necessarily agreeing that there are—to the extent that there are distinctions, then what would happen is we would start o develop a body of law or practice under the AAA rules that would be different based on different states hat arbitrations sit in.

So, that would be, I believe, inappropriate. The AAA constantly tries to maintain a consistent body of national standards. But even putting that issue aside because it's an issue actually that you and Mr. Katz aised earlier, as your Honor points out, the AAA rules equire that either party can appeal from a class certifiation decision. The AAA rules clearly understand that his is a decision that can go to court.

THE ARBITRATOR: It's contemplated that would happen.

MR. DE LEEUW: Here's what may very well happen. If either side decides to appeal your Honor's ecision, there's clearly diversity jurisdiction here. In his case, we are talking about a New Jersey class against a Connecticut company. So, either party could bring the case in federal court. It's likely they would do it in New Jersey federal court. Just as happened with the CIGNA, Health Net and United case, that case would immediately be transferred down to the 11th Circuit as related to the MDL. There is no question that it is, in fact, related. It's identical to those three cases and it's very similar to the class action that was—that's taking the role as a lead case.

So, there is no real doubt if it were to go to federal court and go to the judicial panel and multi-panel litigation, it would go down to the 11th Circuit. In that case, any appeal of this decision going through federal courts would be governed by the 11th Circuit decision, so we'd be right back with what we're taking about is that 11th Circuit decision would be dispositive here.

THE ARBITRATOR: That's really ingenious, but wasn't this case in the New Jersey state court in the first place?

MR. DE LEEUW: Improperly, yes, it was.

THE ARBITRATOR: It wasn't removed then.

MR. DE LEEUW: It was removed out of court into arbitration.

THE ARBITRATOR: But not to federal court on the grounds of diversity.

MR. DE LEEUW: The case was brought improperly. The case was dismissed because it was brought improperly. Judge Bernstein I believe is his name, dismissed the case completely and said this is a case that should have been brought in arbitration. Dr. Sutter chose to disregard his arbitration contract, disregard the obligation to go into arbitration.

Oxford responded very simply, you got to go to arbitration, and so that's why we're here. If either party decides—if your Honor rules that a class is not certifiable, then Mr. Katz may very well choose to go into New ersey Supreme Court. That would be his choice. It may be Oxford's choice to remove that action. Oxford would have a certain amount of time to remove it and in which case, it would go to the 11th Circuit.

If your Honor were to rule and we don't think there is any basis, that a class is certifiable, Oxford could file an action in federal court in New Jersey and that action would go to the 11th Circuit. So, all I'm saying is that it may very well be that the case is going to go to the 11th Circuit. I don't think that is an issue that needs to hold us up very long because I think either way, whether it goes to the 11th Circuit or whether just as a matter of AAA practice, the AAA should follow a consistent body of law. It's clear here that what we're talking about is hat Rule 23 and Rule 4 are identical in all respects.

The New Jersey rule is identical as well. Again, except for the fact that the AAA rule is somewhat more strict in that it doesn't allow these other options for class action. So, either way we're talking about the same standard in the statute or AAA rule. Now, all we're talking about is which cases ought to be looked at as helpful precedent. But what we have here with the 11th Circuit is an Appellate Court decision that I beieve, based on both AAA practice and what might happen very well might happen in appeal, would be the dispositive law here, that the standard is the same. I would like to move on to the next issue.

* * *

AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

FILED
FEB 27 2013
OFFICE OF THE CLERK

No. 12-135

In The
Supreme Court of the United States

OXFORD HEALTH PLANS, LLC,
Petitioner,
v.
JOHN IVAN SUTTER, M.D.,
Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Third Circuit**

BRIEF AMICI CURIAE OF THE AMERICAN MEDICAL ASSOCIATION AND THE MEDICAL SOCIETY OF NEW JERSEY IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

The question presented is:

Whether an arbitrator impermissibly imposes his own policy considerations when, as part of his interpretation of an arbitration agreement, he takes into consideration the likelihood that the parties intended the "bizarre result" of leaving one party with no practicable means of enforcing the contract.

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INTEREST OF AMICI CURIAE

The American Medical Association (AMA) and the Medical Society of New Jersey (MSNJ) (together, the "Amici") respectfully submit this brief amicus curiae in support of the Respondent.[1] The AMA is the largest professional association of physicians, residents and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups, seated in the AMA's House of Delegates, substantially all United States physicians, residents and medical students are represented in the AMA's policy making process. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health. Its members practice in every state, including New Jersey, and in every specialty.

The AMA joins this brief in its own person and as a representative of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center was formed in 1995 as a coalition of the AMA and private, voluntary, nonprofit state medical societies to represent the views of organized medicine in the courts.

Amicus MSNJ is the largest professional association of physicians, residents, and medical students in the state of New Jersey. Through state specialty society eligibility on MSNJ's Board of Trustees and House of Delegates, and its open Policy & Strategy Panel meetings, virtually all physicians in the state of New Jersey may have a voice in MSNJ's policy making process. MSNJ's mission is to promote the betterment of the public health and the science and the art of medicine, to enlighten public opinion in regard to the problems of medicine, and to safeguard the rights of the practitioners of medicine.

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.
Pursuant to Rule 37.6, the Amici affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the Amici, their members, or their counsel made a monetary contribution to this brief's preparation or submission.

Together, the Amici represent hundreds of thousands of doctors, in New Jersey and across the nation. The Amici devote a significant amount of their resources to assisting doctors with contract issues that arise in relationships with health insurance companies. As a result, the Amici have developed extensive knowledge about those contracts, the claims and disputes that arise under those contracts, and how those contracts are or are not enforced. The vast majority of those doctors are parties to arbitration agreements that health insurers like Petitioner, Oxford Health Plans LLC ("Petitioner" or "Oxford"), mandate for all of their in-network doctors. In-network doctors have no choice but to accept the arbitration agreements. Moreover, for the reasons discussed below, most disputes between individual in-network doctors like those involved in this case and health insurance companies like Oxford involve small dollar amounts that cannot effectively be resolved in individual arbitrations. Thus, if the claims must be arbitrated, in the absence of a class arbitration device, physicians and medical associations like the AMA and MSNJ will have no effective means by which to bring their claims against insurers, permitting insurers to breach their agreements with physicians with impunity. Thus, it is in the interest of protecting the basic contractual, statutory, and financial rights of their members, the doctors of America, that the Amici submit this brief to present to the Court the practical implications of Oxford's arguments here.

SUMMARY OF ARGUMENT

The Amici agree strongly with Appellee-Respondent that the Court should not engage in a *de novo* interpretation of the parties' arbitration clause, which is what it appears Petitioner requests that the Court do. The unassailable principle that the judgment of an arbitrator must be afforded the utmost deference – a principle that this Court reaffirmed in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1767 (2010) – requires that the Court not second-guess the arbitrator's contract analysis.[2]

However, the Court also stated in *Stolt-Nielsen* that an arbitrator "exceed[s] his powers" when he imposes his "own view of sound policy regarding class arbitration." *Id.* at 1767-68. Seizing upon this, Petitioner has argued that the arbitrator here improperly applied his own policy preferences when he observed that leaving doctors with no class action device would be a "bizarre result." *See* Brief for Petitioner ("Pet. Br.") at 31.

To the contrary, the Amici submit that consideration of the fact that physicians are effectively precluded from enforcing their contracts with insurers in the absence of a class device is not a

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[2] In *Stolt-Nielsen*, the Court confirmed that in order to have an award vacated, a litigant "must clear a high hurdle. It is not enough for petitioners to show that the panel committed an error – or even a serious error." *Id.* at 1767. Thus, this Court made clear that where "there is a contractual basis for concluding" that the parties agreed to class arbitration, *id.* at 1763, based upon an arbitrator's application of state-law principles of contract interpretation, *id.* at 1773, a court may not disturb the arbitrator's determination.

"policy" consideration, but rather is a matter of contract interpretation pursuant to venerable state law contract interpretation principles, which *Stolt-Nielsen* confirms is the proper role of an arbitrator in such circumstances. *Id.* at 1773. Specifically, the arbitrator's determination here was proper pursuant to the principle of New Jersey contract law that "'[a]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect.'" *Arnold M. Diamond, Inc. v. Gulf Coast Trailing Co.*, 180 F.3d 518, 522 (3d Cir. N.J. 1999) (quoting Restatement (Second) of Contracts § 203 (1981)); *see also Anfield v. Love*, 5 N.J. Super. 347, 351 (App. Div. 1949) (stating that "[a]n interpretation which gives a reasonable, lawful and effective meaning to all manifestations of intention is preferred to an interpretation which leaves a part of such manifestations unreasonable, unlawful or of no effect") (citing Restatement (Second) of Contracts § 203). Thus, the arbitrator's analysis here must be given the traditional deference accorded to an arbitrator's contractual interpretation. *Stolt-Nielsen* 130 S. Ct. at 1767. The question presented therefore does not concern the preemptive effect of the Federal Arbitration Act (the "FAA"); it concerns only a contractual dispute over whether an arbitration clause permits class arbitration.

As is set forth below, the Amici's specialized knowledge regarding the types of claims that typically arise between doctors and health insurers confirms that the absence of a class action device, with the lack of any alternative method for resolving those relatively small claims, leaves doctors with no practicable means of enforcing their contracts with insurers. For the reasons discussed in greater detail below, to interpret a broadly-worded arbitration clause[3] that states that "all . . . disputes shall be submitted . . . to . . . arbitration" and does not expressly specify whether or not class arbitration is permitted[4] as *not* permitting class arbitration, when doctors have no effective alternative method for bringing their individual claims, would leave doctors with no recourse at all, even where, as here, there is no evidence that they intended to waive their rights to contractual remedies.

Additionally, medical associations like the AMA and MSNJ, who have an interest in enforcing fiduciary-based actions under federal or state law, would be precluded from obtaining injunctive relief on behalf of their members. Injunctive relief is the exclusive remedy associations like the AMA and MSNJ may seek to protect the contractual and financial rights of their members.

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[3] Significantly, in *Stolt-Nielsen* this Court did not reject the idea that the breadth of an arbitration agreement could be viewed as a valid "contractual basis" for finding that the parties agreed to class arbitration. Instead, the majority expressly never reached the question because of the parties' stipulation that there was no agreement. 130 S. Ct. at 1770 ("The panel also commented on the breadth of the language of the [contract], but since the only task that was left for the panel, in light of the parties' stipulation, was to identify the governing rule applicable . . . the particular wording of the [contract] was quite beside the point." (emphasis added)).

[4] While Petitioner maintains that the arbitration agreement here is "silent" on the issue of class arbitration, as is discussed more fully below, the mere absence of the words "class arbitration" in the arbitration clause does not equate to silence. Rather, the arbitration agreement clearly speaks to "all disputes" being brought exclusively in arbitration. As is also detailed below, this clearly excludes the use of small claims court, as well as class actions in court, and if interpreted as also excluding class claims in arbitration, effectively precludes any enforcement of doctors' contractual and statutory rights, without an express waiver.

Since health insurers like Oxford know that arbitration is a seldom-used and ineffective way of bringing individual claims, they can violate their contracts with doctors with impunity, underpaying doctors and leaving them with no effective means to challenge such underpayments. As is further discussed below, this lack of any recourse, in a contract of adhesion such as the contracts doctors are compelled to enter into with insurers, and with no notice to doctors that they have waived all practicable means of enforcing their contracts, would render the arbitration clause unreasonable, and would leave portions of the clause to no effect.

Pursuant to state-law contract interpretation principles, and not public policy, such an interpretation is to be avoided, and thus the arbitrator's determination that the lack of a class device would be a "bizarre result" led properly to his rejection of such an interpretation. Because this Court has unequivocally stated that extreme deference must be given to an arbitrator who has found a contractual basis for concluding that the parties agreed to class arbitration, Petitioner's request that this Court conduct a *de novo* inquiry into the propriety of that determination must fail.

ARGUMENT

I

AN INTERPRETATION OF THE ARBITRATION CLAUSE AS EXCLUDING A CLASS DEVICE, WITH NO OTHER REASONABLE ALTERNATIVE FOR RESOLVING DOCTORS' CLAIMS AGAINST OXFORD, WOULD VIOLATE STATE CONTRACT INTERPRETATION PRINCIPLES

The Amici know from their vast experience with Oxford's standard participating physician contract and ones like it that limiting doctors to individual arbitration – without a class device or another option such as bringing a claim in small claims court – would indeed leave doctors without any practicable means to enforce their contractual and statutory rights.[5]

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[5] As is demonstrated in Section IV, *infra*, this is not a policy argument, but rather is one of contract interpretation under the principle of New Jersey contract interpretation law that "'[a]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect.'" *Arnold M. Diamond, Inc.*, 180 F.3d at 522)); *see also Anfield v. Love*, 5 N.J. Super. at 351. For the reasons set forth herein, reading the arbitration clause here as excluding a class device would effectively allow no claims, in court *or* in arbitration, and thus would be an "unreasonable" contract interpretation that would render "to no effect" the portion of the arbitration clause stating that "all such disputes shall be submitted . . . to . . . arbitration." *See* Joint Appendix ("J.A.") 73. Accordingly, the arbitrator's rejection of such a reading was simply the proper application of that principle of contract interpretation.

A. Individual Arbitration Is Not a Viable Means for Doctors to Bring Their Claims Against Oxford and Other Health Insurers

Health insurers such as Oxford regularly mandate arbitration agreements for all of their in-network doctors. Doctors needing to participate in insurers' health care networks in order to be able to treat patients who are enrollees in those networks have no choice but to accept the arbitration agreements. Moreover, most disputes between individual in-network doctors like those involved in this case and health insurance companies like Oxford involve small dollar amounts that cannot effectively be resolved in individual arbitrations. Thus, if the claims must be arbitrated – and insurers like Oxford insist that they must – in the absence of a class arbitration device, doctors will have no realistic means by which to bring their claims against insurers, permitting insurers to breach their agreements with doctors with impunity and without recourse on the part of doctors.

1. The Typical Claim by a Doctor Against an Insurer Is Relatively Small

The types of disputes that frequently arise between doctors and insurers include disputes such as those underlying the claims brought by Dr. Sutter in this arbitration – billing disputes arising out of insurers' application (or misapplication) of billing codes, known as "Current Procedural Terminology codes" or "CPT codes," developed by the AMA, that are submitted by doctors when they make claims for payment for services provided to enrollees in insurers' healthcare networks. For example, a doctor and insurer may differ over the proper level of a so-called "evaluation and management" procedure (coded "1" for the simplest procedure, through "5" for the most complex) or the proper use of a so-called "modifier" code, which is appended to a coded claim to indicate a heightened degree of care that should result in increased payment, but which insurers like Oxford routinely deny. Indeed, modifier 25 is a frequently used modifier that Oxford has automatically and improperly denied in claims from class members in this case during much of the class period. Some of these disputes are valued in the tens of dollars, and others are in the hundreds. It is a rare dispute between an in-network doctor and a health insurance company that involves more than one thousand dollars.

2. Prosecuting Such Small Claims in Individual Arbitration Is Impossible, Given the Costs of Arbitration

There are many reasons why doctors cannot prosecute their claims through individual arbitration. First, the cost of bringing an arbitration will almost always exceed the amount an individual doctor could potentially recover through arbitration. Putting aside the legal fees that doctors must pay to level the playing field against health insurance companies that are always represented by experienced and able counsel, the doctor's share of the arbitrator's fees alone exceed the value of most claims.

In one study, the mean and median per-day fees of the responding arbitrators were greater than $1,000, and at least one arbitrator charged up to $5,000 for a single day.[6] As reported by the American Arbitration Association itself, pursuant to changes that will take effect on March 1, 2013,[7] "[a]rbitrators serving on a case with an in-person or telephonic hearing will receive compensation at a rate of $1,500 per day," and "[a]rbitrators serving on a case with a desk arbitration/documents only hearing will receive compensation at a rate of $750 per day."[8] These fees are in addition to an initial filing fee of $200.[9] Obviously, it is utterly infeasible for a doctor to pay those kinds of fees to bring a claim worth under $1,000. Even the rare claim for several thousands of dollars becomes untenable in the face of even a single day's arbitrator fees, let alone the prospect of multiple days before an arbitrator.

Moreover, arbitration costs add up because, in addition to daily fees for time spent actually hearing the arbitration, there are fees for each task an arbitrator is requested to perform—*e.g.*, billing by the hour for issuing written findings of fact and conclusions of law (tasks that courts undertake without additional payment).[10] As a result, one study concluded that forum costs "can be up to *five thousand percent higher* in arbitration than in court litigation."[11]

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[6] *See* Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. Mich. J.L. Reform 813, 833 (2008).

[7] AAA, *Costs of Arbitration (including AAA Administrative Fees)*, http://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTAGE2009593&RevisionSelectionMethod=LatestReleased (last visited February 20, 2013), at 1.

[8] *Id.*

[9] *Id.*

In addition to the arbitration fees, there is also a high cost for doctors and their staff to take time from their practices to devote to arbitration. Every hour that doctors spend in arbitration is an hour that they could be devoting to patients and billing Oxford or another health insurance company for their services. Every hour that a staff member spends in preparing for and participating in arbitration is an hour that could be devoted (or that someone else has to devote) to other tasks in the doctor's office. Ultimately, the cost of bringing a claim in arbitration so far outweighs the value of any individual claim that the class action procedure is the only practicable method for resolving disputes between doctors and health insurance companies like Oxford.

Further, the types of claims asserted here, in which the propriety of the adjustments an insurer makes to the billing codes doctors have submitted (the insurer's "editing" of the claim) is disputed, require the analysis of experts in proper CPT coding and claims editing and payment, as well as the analysis of experts in analyzing claims data. The expert fees involved in obtaining this kind of analysis, which routinely run into many thousands of dollars, dwarf any potential recovery by an individual physician, rendering it impossible to bring such claims individually.

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[10] Public Citizen, *The Costs of Arbitration* (April 2002), www.citizen.org/documents/ACF110A.PDF (last visited February 20, 2013), at 43.

[11] *Id.* at 1 (emphasis added).

3. Individual Arbitrations, Even If They Were Brought, Could Not Adequately Address the Pervasive Practices at Issue in Cases Like This One

Even if doctors were to bring individual arbitrations, such arbitrations are particularly unlikely to provide an effective means of redressing the kinds of pervasive practices challenged by Dr. Sutter in this arbitration. Dr. Sutter's arbitration Demand asserted claims for violation of various statutes, including the New Jersey Consumer Fraud Act, the New Jersey Prompt Payment Act, and the Healthcare Information Networks and Technologies Act, on the basis of the systemic wrongful practices by Oxford that are alleged in the Demand. The limited scope of individual arbitrations would not permit physicians the opportunity to present evidence of the systemic, pervasive nature of the wrongful practices alleged. Such disjointed arbitrations, if they were brought at all, would not allow physicians to effectively vindicate their statutory causes of action, as this Court has stated is *required* for an arbitration clause to be enforced. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26-28 (1991).

The fact that no overarching pattern of wrongful conduct could possibly be litigated or remedied in an individual arbitration is undoubtedly a central reason why Oxford has so vociferously opposed every effort by doctors to bring these types of claims on a class-wide basis. Over the course of more than a decade, Oxford has done everything in its power to avoid class treatment of the claims here, repeatedly seeking to undo the arbitrator's determination that class arbitration is permitted, through motions to the arbitrator, motions to the district court, and multiple appeals, finally going so far as to come before this venerable Court, to avoid resolving the merits of this dispute on a class-wide basis. As discussed in Section I.A.4 below, this zealous opposition to class treatment – which at this point has likely cost Oxford more in legal fees and arbitrator fees than even a judgment on behalf of the class would have – would seem to have more behind it than simply the desire to avoid paying the claims of a class.

4. Individual Arbitrations Do Not Provide Injunctive Relief, Which Is Not Only Inefficient, But Also Disenfranchises Medical Societies From Pursuing the Only Kind of Relief to Which They Are Entitled

Individual arbitrations do not provide a critical remedy sought in many class actions: injunctive relief to stop the misconduct at issue – here, to enjoin wrongful editing of physician claims to reduce payments. Thus, even if Respondent were to obtain an arbitral award, this remedy would not enjoin Oxford from continuing its practices as to every other physician in New Jersey, who would have to arbitrate his or her future claims one after the other.

Repeated arbitrations without the possibility of injunctive relief are inefficient not only for physicians, but also for Oxford. If efficiency were Oxford's real goal, it would welcome class arbitration, as such a procedure would adjudicate all similar claims at once and have *res judicata* effect. Nevertheless, it is evident that Oxford would rather pay hundreds of claims individually in arbitration (to the extent such claims could and would be filed) and continue its practices unabated so that it would never have to stop its wrongful – and lucrative – conduct.

The AMA and MSNJ, in their associational capacity, have an interest in pursuing injunctive relief to compel health insurers to discontinue the practice of under-reimbursing physicians, which is the kind of relief they seek as part of their participation alongside individual physicians in class actions. Pursuant to the test set forth by this Court in *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977), "an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." The associations' standing on behalf of their members is limited to injunctive relief, not damages or benefits. *Id.* (citing *Warth v. Seldin*, 422 U.S. 490, 515 (1975)).

However, if the members of an association have to arbitrate their claims, the association will not be permitted to bring a suit in court on its members' behalf, because the first prong of the *Hunt* test, requiring that an association's "members would otherwise have standing to sue in their own right," will not be satisfied. *Id.* And because the association does not have a contract with the insurer, and thus there is no arbitration clause between the association and the insurer, the association will not be permitted to bring a claim in arbitration on its members' behalf. Therefore, individual arbitration disenfranchises the AMA, MSNJ, and other medical associations, and prevents the members of those associations from obtaining the only type of relief associations are permitted to seek on behalf of their members – injunctive relief – which is a critical component of the associations' efforts to protect the basic contractual and financial interests of their physician members.

5. If Doctors Must Arbitrate Their Claims Against Health Insurers, Class Arbitration Is the Only Viable Means for Them To Do So

In her dissent in *Stolt-Nielsen*, Justice Ginsberg noted that "[w]hen adjudication is costly and individual claims are no more than modest in size, class proceedings may be 'the thing,' *i.e.*, without them, potential claimants will have little, if any, incentive to seek vindication of their rights." 130 S. Ct. at 1775 (citing *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 617 (1997); *Carnegie v.*

Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) ("The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.")). That is precisely the Amici's point here.

In its Comments to the Bureau of Financial Protection in Response to Request for Information for Study of Pre-Dispute Arbitration Agreements,[12] the public interest law firm of Public Justice, P.C., observed, in the context of consumer lending agreements, that "the principal effect of mandatory arbitration clauses . . . *is to wipe away claims*."[13] Public Justice explained: "An enormous body of evidence supports the proposition that class action bans in arbitration clauses serve to suppress consumers from pursuing claims against lenders (or other corporate defendants)."[14] Reviewing years' worth of data on the question, Public Justice concluded that "[t]he broad data, as well as a number of potent evidentiary records in particular cases confirms the obvious – that if consumers must each individually pursue their claims in arbitration, lenders will be immunized from liability for all but a tiny proportion of the legal wrongs they may commit."[15] Similarly, if doctors are required to pursue their claims in individual arbitration, insurers will be immunized from liability for their wrongful underpayments of doctors.

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[12] Docket No. CFPB-2012-0017, June 23, 2012, http://publicjustice.net/sites/default/files/downloads/PublicJusti PublicJusticeCom_ReMandatoryArbitration_Jun2012.pdf. (last visited Feb. 28, 2013)

[13] *Id.* at 8 (emphasis added).

[14] *Id.* at 14.

[15] *Id.* at 4.

B. In the Absence of an Alternative Such as Small Claims Court, Doctors Are Left With No Means By Which to Bring Claims Against Oxford

As is discussed in greater detail below, this case is readily distinguishable from ***AT&T Mobility LLC v. Concepcion***, 131 S. Ct. 1740 (2011), for a variety of reasons. An important distinction is the fact that in *Concepcion*, pursuant to the terms of the contract at issue, the consumer had the option of going to small claims court instead of to arbitration. *Id.* at 1744. Here, there is no such alternative option, as the arbitration clause expressly states that "no civil action concerning any dispute arising under [the parties'] agreement shall be instituted before *any* court." J.A. 30 (emphasis added). If physicians could take their claims to small claims court, they might have a viable means to bring at least certain of their claims without incurring the extraordinary costs of individual arbitration noted above.

To begin with, in small claims court, unlike in arbitration, doctors would not have to pay the arbitrator's fees. Parties in small claims court can also avoid paying attorneys' fees by appearing *pro se*. Plaintiffs in small claims court are generally unrepresented because the process of the court is designed to allow access to the courts at minimal expense.[16] For example, cases brought in small claims court in New York City are automatically placed on the court's evening calendar so that most people do not have to miss work to bring their lawsuits,[17] which is vital for physicians with small practices who might be financially harmed if they missed one or more days of work. Moreover, the filing fees are generally less than in arbitration. For example, in New York City, the cost to file a small claim is \$15-\$20.[18] The cost for filing a complaint in New Jersey small claims court is \$15 for one defendant and \$2 for each additional defendant.[19] An example of the fees from a Pennsylvania small claims court ranges from \$25 for a \$600 claim to \$65 for a claim of \$10,000.[20] And claimants who are not able to afford filing fees may have the fees waived.[21]

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[16] *See* 121 Am. Jur. Trials 189 (2011); *A Guide to Small Claims*

The process of pursuing a claim in small claims court is straightforward. In New Jersey, for example, a complaint form is available from the Clerk of the Special Civil Part in the county in which

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Court, N.Y. State Unified Court Sys., http://www.courts.state.ny.us/ithaca/city/webpageguidetosmallclaims.html (last visited Feb. 23, 2013) ("it is not necessary to have an attorney since Small Claims Court is meant to be a 'people's court' where claims may be tried speedily, informally, and inexpensively.").

[17] *New York City Civil Court Small Claims Part In General*, N.Y. STATE UNIFIED COURT SYS., http://www.nycourts.gov/courts/nyc/smallclaims/general.shtml (last visited Feb. 23, 2013).

[18] N.Y. Prac., Enforcing Judgments and Collecting Debts § 3:405

[19] 3 N.J. Prac., Civil Practice Forms § 1:18 (6th ed.)

[20] 121 Am. Jur. Trials 189

[21] *See Small Claims FAQ*,' N.J. Courts, http://www.judiciary.state.nj.us/civil/civ-02.htm#FileComSC (last visited Feb. 23, 2013).

the case is filed, and requires only the complainant's and defendant's contact information, amount of damages, why defendant owes complainant money, whether the parties are in other litigation, and the complainant's signature.[22] The court clerk generally makes the process as easy as possible for a complainant by taking care of the service to defendant and also providing a complaint packet for self-represented litigants with accompanying instructions.[23] On the day of the trial, the court may have a mediator help the litigants settle the case.[24] And if a judge does hear the case, a claimant can have a more level playing field against a corporation because the rules of evidence are relaxed.[25] Accordingly, the possibility of bringing claims in small claims court would largely alleviate many of the burdens imposed by individual arbitration.

However, unlike the arbitration clause in *Concepcion*, Oxford's arbitration clause clearly forecloses the use of small claims court by physicians, as is noted above. And as is shown at length above, limiting physicians solely to individual arbitration leaves them without *any* effective means of enforcing their contractual and statutory rights, despite the fact that they did not expressly waive their remedies – a "bizarre" result indeed.

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[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] 121 Am. Jur. Trials 189.

II

THIS COURT'S OPINION IN *STOLT-NIELSEN* DOES NOT PRECLUDE CONSIDERATION OF THESE FACTORS UNDER THE CIRCUMSTANCES PRESENTED HERE

In her dissent in *Stolt-Nielsen*, Justice Ginsberg pointed out several "stopping points" in the majority's opinion that clearly support the Amici's position here. First, she noted that "by observing that 'the parties [in *Stolt-Nielsen*] are sophisticated business entities,' and 'that it is customary for the shipper to choose the charter party that is used for a particular shipment,' the Court apparently spares from its affirmative-authorization requirement contracts of adhesion presented on a take-it-or-leave-it basis." 130 S. Ct. at 1783. Indeed, this Court's repeated observation in *Stolt-Nielsen* that the parties there were both "sophisticated *business* entities," *e.g.*, *id.* at 1775 (emphasis added), is a significant distinction between that case and this one.

Here, the parties are a huge corporation and its team of contracting lawyers on the one hand, and a pediatrician on the other hand. While Dr. Sutter and other physicians in the class, and for that matter all of the Amici's members, are obviously well-educated individuals, their expertise is in medicine, not business. To be certain, doctors are no experts in the niceties of contract law or the negotiation of arbitration agreements. And doctors ordinarily are not represented by counsel when they are presented with participating physician agreements by insurers, which are offered on a take-it-or-leave-it basis, with very little time to review the terms, and commonly contain arbitration clauses like the one at issue here. Notably, most of the Amici's members have individual contracts with insurers, many of which automatically renew after an initial contract period, with no opportunity to renegotiate. The contracts also frequently state that any new payment policies that the insurer implements in the future are "incorporated by reference" into the existing contracts. Further, even if the parties were on equal footing with respect to the level of "sophistication" in matters of business, the number of alternative parties with whom a physician can contract in the New Jersey market is small, giving each insurer disproportionate bargaining power over physicians.[26] Thus, unlike in *Stolt-Nielsen*, the only "sophisticated *business* entit[y]" in this case is Oxford.

Moreover, while in *Stolt-Nielsen* it was "customary for the shipper [*i.e.*, the party who was the proponent of class arbitration in that case] to choose the [standard industry contract] that is used for a particular shipment," 130 S. Ct. at 1775, here it was Oxford – the *opponent* to class arbitration – who not only chose the arbitration clause, but drafted the clause, compelled doctors to enter into it, and insisted upon enforcement of the arbitration clause when doctors tried to litigate their claims. Indeed, it is by no means "customary" for there to be *any* negotiation of contracts between Oxford and its participating physicians. As is alleged in Claimant's Demand for Arbitration (the "Demand"), Oxford's in-network physician agreements and those of other insurers are offered on a take-it-or-leave-it basis, with no individual negotiation of terms:

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[26] Consolidation and mergers of insurance companies have left only Aetna, Inc., Horizon Blue Cross Blue Shield of New Jersey, Cigna HealthCare, and United Healthcare Services, Inc. and its subsidiary Oxford with any substantial footprint in the New Jersey private payor market.

> The Insurer Defendants have developed and maintained their provider networks by requiring Sutter and the members of the Plaintiff Sub-Classes to execute standardized, one-sided contracts of adhesion. It is indisputable that there is no arms-length negotiating between the Insurer Defendants and the Plaintiffs regarding the terms and conditions of the provider agreements, and the plaintiffs are forced to accept these take-it-or-leave-it contracts. In fact, there is simply no alternative available if the plaintiffs want access to the vast patient bases that receive their health insurance from the Insurer Defendants. In short, Sutter and the members of the Plaintiff Sub-Classes are placed in the untenable position of either accepting the unconscionable terms and conditions presented to them or deciding to no longer provide services to members in the defendants' plans.

Demand ¶ 16. For these reasons, among others, the instant case does not fall within the factual framework that was presented to the Court in *Stolt-*

Nielsen, and thus merits the consideration of different factors by the Court, including those presented by the Amici herein.

III

THE AMICI'S POSITION DOES NOT RUN COUNTER TO THIS COURT'S DECISION IN *AT&T MOBILITY LLC V. CONCEPCION*

As is noted above, this case is readily distinguishable from the one presented to this Court in *Concepcion*, 131 S. Ct. 1740, in which the Court rejected the application of state law to declare an express class arbitration waiver unconscionable and unenforceable. In addition to the availability of the option of bringing one's claims in small claims court that was present in *Concepcion*, discussed above, the waiver of a class device was *express* in *Concepcion*, and thus there was no need for anyone to *interpret* the contract to determine whether the parties had agreed to class arbitration. Thus, principles of contract interpretation such as those cited above never came into play. Indeed, in *Concepcion*, the invalidation of the class arbitration ban was admittedly and expressly based upon a state *policy* determination that such bans are unconscionable in certain circumstances. *Id.* at 1745.

Further, the invalidation of the class arbitration waiver in *Concepcion* came from a court, not an arbitrator. Accordingly, direct, searching review of the court's analysis was entirely proper there, as the fundamental underlying principle at work here – extreme deference to an arbitrator's interpretation of a contract that he or she has been charged by the parties with interpreting – was entirely absent.

As this Court observed in *Concepcion*, "[t]he overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Id.* at 1748. The notion that an arbitrator's determination on a question that the parties expressly entrusted to him to decide should be subjected to repeated review by multiple courts runs directly counter to this very principle. Here, the parties expressly agreed to have the arbitrator decide the question of whether class arbitration was permitted under their agreement. *See* J.A. 29. The arbitrator decided that question. Petitioner's repeatedly running from arbitration to court, and then pursuing appeal after appeal in an ongoing effort to undo the arbitrator's decision, is inconsistent with the parties' agreement, and does quite the opposite of "facilitat[ing] streamlined proceedings." *Concepcion*, 131 S. Ct. at 1748. The parties did not agree to a hybrid arbitration/litigation arrangement that places the rulings of the arbitrator on the same plane as the decisions of a trial court, which are subject to direct appellate review. The parties agreed to let the arbitrator decide, with only the most limited review by a court, in only the most egregious of circumstances; under the FAA, that agreement must be enforced according to its terms.

Despite being the party who required arbitration of physician claims under its contracts in the first place, and who successfully moved to compel arbitration of this dispute some eleven years ago, Petitioner has exhibited an utter unwillingness to allow the arbitrator hearing this matter to get on with his job of adjudicating the claims at issue. As is set forth in the Third Circuit's opinion below,[27] the arbitrator first determined that class arbitration was permitted under the parties' agreement in his clause construction award almost ten years ago, in September of 2003. Upon certification of the class in 2005, Petitioner moved in court to vacate the panel's class certification award. When that failed, Petitioner appealed to the Third Circuit, and again failed. When this Court decided *Stolt-Nielsen*, Petitioner went back to the arbitrator and moved for reconsideration of the 2003 clause construction award. When the arbitrator issued his Procedural Order No. 18 denying Petitioner's motion for reconsideration and reaffirming his determination that class arbitration is permitted under the parties' arbitration clause, Petitioner moved the district court to reopen the federal case and to vacate Procedural Order No. 18. When the district court denied the motion to vacate, Oxford appealed again to the Third Circuit.[28] And when the Third Circuit once again affirmed the arbitrator's clause construction award, almost *nine years* after the arbitrator first determined that class arbitration was permitted, Oxford came to the Supreme Court on a Petition for Writ of Certiorari.

The *Sutter* case is not unique in this regard. In a virtually identical case brought against Oxford by physicians in New York, *Robert Scher, M.D. v.*

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[27] *Sutter v. Oxford Health Plans, LLC*, 675 F.3d 215, 217-18 (3d Cir. 2012).

[28] *Id.*

Oxford Health Plans, Inc. and Oxford Health Plans of New York, Inc., AAA Case No. 11 193 00548 05, Oxford has exhibited a similar unwillingness to allow the three-person arbitration panel hearing that case to do its job. When the Panel ruled against Oxford and issued its Clause Construction Award permitting class arbitration, Oxford moved to vacate the award in New York Supreme Court. Oxford won its motion to vacate, only to have that decision reversed on Claimant's appeal.[29] When the Panel certified the class in a unanimous opinion, Oxford returned to court with a motion to vacate that decision. When that failed,[30] Oxford appealed. In the meantime, Oxford made a motion to the Panel to decertify the class on the basis of *Stolt-Nielsen*, arguing once again that class arbitration is not permitted under the parties' contract. The Panel rejected that argument, and the Appellate Division subsequently rejected it too, on Oxford's appeal.[31] It was only when the parties finally settled the case in late 2012 that Oxford's long pattern of trying to undo class arbitration in the *Scher* case finally came to an end.

Such repeated judicial review itself has made the arbitration procedure extremely costly and inefficient for doctors even when class arbitration has been permitted. For that reason, the Court should carefully consider the scope of judicial review proposed by Petitioner, and make clear that arbitration remains a system separate from the court system, with arbitration awards not open to appellate review to the same extent as decisions by courts. If Oxford and other insurance companies so prefer the oversight of the courts, they should not have insisted upon arbitration in the first place.

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[29] *Cheng v. Oxford Health Plans, Inc.*, 45 A.D.3d 356, 846 N.Y.S.2d 16, 2007 N.Y. Slip Op. 8757 (1st Dep't 2007).

[30] *See Cheng v. Oxford Health Plans, Inc.*, 2009 N.Y. Misc. LEXIS 5081; 2009 NY Slip Op 32602(U) (Sup. Ct. NY County, 2009).

[31] *See Cheng v. Oxford Health Plans, Inc.*, 84 A.D.3d 673, 923 N.Y.S.2d 533, 2011 N.Y. Slip Op. 4508 (1st Dep't 2011).

IV

THE ARBITRATOR'S CONSIDERATION OF THE "BIZARRE RESULT" OF A LACK OF A CLASS DEVICE WAS NOT THE APPLICATION OF THE ARBITRATOR'S POLICY PREFERENCES, BUT THE APPLICATION OF STATE-LAW CONTRACT INTERPRETATION PRINCIPLES, WHICH SHOULD BE ACCORDED DEFERENCE

Oxford has argued that the arbitrator here has "exceed[ed] his powers" by imposing his "own view of sound policy regarding class arbitration," as is purportedly shown by his comment that leaving doctors with no class action device would be a "bizarre result." Pet. Br. at 31 (quoting *Stolt-Nielsen*, 130 S. Ct. at 1767-68). To the contrary, the Amici submit that consideration of the fact that doctors are effectively precluded from bringing claims against insurers in the absence of a class device is not a "policy" consideration at all, but rather is a matter of contract interpretation, and thus must be given the traditional deference accorded to an arbitrator's contractual interpretation.

It is a principle of general contract interpretation, recognized in New Jersey and elsewhere, that "'[a]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect.'" *Arnold M. Diamond, Inc.*, 180 F.3d at 522 (3d Cir. N.J. 1999) (quoting Restatement (Second) of Contracts § 203 (1981)); *See also Anfield*, 5 N.J. Super. at 351. Leaving aside the question of whether an arbitration clause that excludes class arbitration would be exculpatory and thus "unlawful" under New Jersey law in the circumstances presented here,[32] reading the arbitration clause here as excluding a class device would be an "unreasonable" contract interpretation that would render "to no effect" the portion of the arbitration clause stating that "all such disputes shall be submitted . . . to . . . arbitration." *See* J.A. 73. While the arbitration clause states that *all* claims shall be brought in arbitration, the lack of a class device would effectively allow *no* claims, in court *or* in arbitration, as discussed above. Thus, under New Jersey contract interpretation principles, such an interpretation was properly rejected by the arbitrator.

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[32] Another well-established principle of contract interpretation in New Jersey is that exculpatory clauses are unenforceable, and thus would be "unlawful." *See, e.g., Muhammad v. County Bank of Rehoboth Beach, Delaware*, 189 N.J. 1, 19 (N.J. 2006) (citing *McCarthy v. NASCAR, Inc.*, 48 N.J. 539, 542, 226 A.2d 713 (1967)). While this Court rejected the application of a similar state law principle to render express class action waivers unenforceable as exculpatory and thus unconscionable under the circumstances presented in *Concepcion*, 131 S. Ct. 1740, the Amici submit that this case is clearly distinguishable from *Concepcion* for several reasons set forth above. However, the Court need not reach the question of whether the arbitration clause here would be exculpatory and "unlawful" if it did not permit class arbitration, as the arbitrator here did not base his determination on such a finding. Instead, as is discussed below, the arbitrator found that it simply did not make sense, and was inconsistent with the express language of the clause itself, to read the clause as not permitting class arbitration. Thus, because such a reading would "leave[] a part of [the arbitration clause] unreasonable . . . or of no effect," and thus would violate New Jersey contract interpretation principles, the question of whether it would also render it "unlawful" need not be considered here. *Anfield*, 5 N.J. Super. at 351.

Significantly, there is no need for this Court to speculate about what the arbitrator was thinking when he made the "bizarre result" observation, as he has subsequently made clear exactly what was behind that comment. When Oxford moved for reconsideration of the initial Clause Construction Award in the wake of *Stolt-Nielsen*, the arbitrator himself stated that his original determination "involved no . . . adventures into public policy but was rather concerned solely with the parties' intent as evidenced by the words of the arbitration clause itself."[33] J.A. 69. The arbitrator went on to explain that rather than being "silent" on the issue of class arbitration, the arbitration clause here spoke quite clearly to the permissibility of class arbitration:

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[33] Petitioner's challenge clearly implies that the arbitrator was dissembling when he unequivocally denied that he had based his decision on policy considerations. But Petitioner has not argued, let alone demonstrated, that there was any "corruption" or other "misconduct" or "misbehavior" on the part of the arbitrator, as would justify vacating the award under 9 U.S.C. § 10(a), so the suggestion that the arbitrator was flatly dishonest about the bases for his original clause construction award should be rejected out of hand.

> The arbitration clause speaks of "no civil action [being brought in any court]." No civil action, in my view means no civil action, of any form whatsoever. Since a class action is a form of civil action, the clause can be paraphrased: "No class action concerning any dispute arising under this agreement shall be instituted before any court, and all such disputes shall be submitted . . . to . . . arbitration." "No civil action" simply cannot, as a matter or English, be read to exclude any particular civil proceeding, including a class action, from its coverage.
>
> Therefore, the text of the clause itself authorizes, indeed requires, class-action arbitration.

Id. at 73. A contrary reading would conflict directly with the plain-English meaning of the words of the contract and the principles of contract interpretation discussed above. Policy considerations plainly were not behind the arbitrator's determination.

Any other interpretation of the arbitration clause would have violated the legal principle against interpretations that are not "reasonable" or that leave part of an agreement "to no effect." The clause is not silent on the issue of class arbitration, but rather, clearly encompasses class actions within the disputes that must be brought in arbitration.

The arbitrator's observation that an alternative reading would render a "bizarre" result reflects only his application of sound contract-interpretation principles, and not the improper consideration of his own policy preferences.

CONCLUSION

For the reasons stated above, the decision below should be affirmed.

DATED: February, 2013

Respectfully submitted,

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AMICUS
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BRIEF

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AND
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IN THE

Supreme Court of the United States

OXFORD HEALTH PLANS LLC,
Petitioner,
v.
JOHN IVAN SUTTER, M.D.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

Many of the Chamber's members and affiliates routinely include arbitration agreements in their business contracts. Consequently, the Chamber regularly submits *amicus* briefs in cases presenting issues under the Federal Arbitration Act (FAA), including in recent cases before this Court. See, *e.g.*, *Am. Express Co.* v. *Italian Colors Restaurant*, No. 12-133 (U.S. granted Nov. 9, 2012); *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740 (2011); *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010); *Green Tree Fin. Corp.* v. *Bazzle*, 539 U.S. 444 (2003). For a collection of the Chamber's recent *amicus* briefs in arbitration cases under the FAA, see http://

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3, *amicus curiae* states that all parties have consented to the filing of this brief by filing letters with the Clerk of the Court granting blanket consent to the filing of *amicus* briefs.

chamberlitigation.com/cases/issue/arbitration-alternative-dispute-resolution.

The question presented in this case significantly affects the interests of the Chamber and its members. First, the decision below undermines the ability of parties to structure their arbitration agreements so as to secure a meaningful alternative to litigation. Likewise, if permitted to stand, the decision below would discourage arbitration by creating a substantial risk that agreements to arbitrate may be transformed unilaterally to encompass class arbitration even where the contracting parties have not manifested their intent to do so.

As a result, for the reasons set forth in petitioner's brief and for the reasons set forth below, the Chamber respectfully submits that the decision of the Third Circuit should be reversed.

SUMMARY OF ARGUMENT

I. Unlike litigation, private arbitration under the FAA is a matter of consent, not coercion. Through arbitration, parties are able to avoid costly and time-consuming litigation by submitting to a streamlined process based upon the mutual consent of all parties to the arbitration agreement. Compelling parties to resolve disputes through costly, time-consuming, and high-stakes class-action arbitration, when the parties have not agreed to do so, frustrates the parties' intent, undermines their agreements, and erodes the benefits offered by arbitration as an alternative to litigation. Imposing class arbitration on parties who have not agreed to do so thus conflicts with the FAA's goal of ensuring that arbitration agreements are enforced according to the terms agreed to by the parties.

Moreover, the ability of parties to structure and limit their agreements to arbitrate is a core component of the FAA's policy to promote arbitration. Under the FAA, parties to an arbitration agreement can (1) limit the issues they choose to arbitrate, (2) agree to the rules that will govern arbitration, and, above all, (3) decide specifically "*with whom*" they choose to arbitrate. *Stolt-Nielsen*, 130 S. Ct. at 1774. Given that "class-action arbitration changes the nature of arbitration" in each of these fundamental respects, this Court has expressed "reason to doubt the parties' mutual consent to resolve disputes through class-wide arbitration." *Id.* at 1775–76. If, however, the adoption of a standard arbitration clause could justify imposing class arbitration, then "[t]he willingness of parties to enter into agreements that provide for arbitration . . . would be 'drastically reduced.'" *AT&T Techs., Inc.* v. *Commc'ns Workers of Am.*, 475 U.S. 643, 651 (1986). That result would conflict with the FAA's core goal of *promoting* private arbitration by making sure that arbitration contracts are enforced in accordance with the parties' actual agreement.

Applying these principles, this Court already has ruled that "[a]n implicit agreement to authorize class-action arbitration . . . is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate." *Stolt-Nielsen*, 130 S. Ct. at 1775. That ruling forecloses the arbitrator's decision here, which purported to infer an intent to authorize class arbitration from the parties' adoption of a standard agreement to forgo litigation in favor of mandatory arbitration. Under this Court's decision in *Stolt-Nielsen*, that is an insufficient contractual basis to authorize class arbitration.

II. Alternatively, the Chamber submits that, under the FAA, before class arbitration may be imposed, there must be "clear and unmistakable" evidence that the agreement extends the arbitrator's jurisdiction to encompass the resolution of disputes involving third parties through class-action arbitration. Cf. *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 944–45 (1995) (requiring "clear and unmistakable" showing that parties agreed to have arbitrators "decide the scope of their own powers").

Requiring clear and unmistakable evidence of the parties' mutual consent to adopt class-wide arbitration promotes the underlying goals of the FAA. It reinforces the consensual nature of arbitration by precluding inadvertent imposition of class arbitration where, as here, there are compelling reasons to doubt that the parties would have agreed to authorize class-action arbitration without ever saying so. Further, the requirement of clear and unmistakable evidence reduces the risk that the parties' agreement will be transformed from a standard bilateral arbitration contract to encompass class-wide arbitration in the absence of mutual assent by the parties. Eliminating that risk is essential to promoting resort to private arbitration as an alternative to litigation.

For the reasons set forth in petitioner's brief, as well as those stated below, the agreement to arbitrate in this case does not authorize an arbitrator to exercise jurisdiction over class-wide arbitration, complete with the complexity and procedural trappings inherent in such an undertaking. The decision below upheld an arbitrator's decision to order class arbitration based on nothing more than a standard clause—essential to any mandatory arbitration agreement—requiring the parties to arbitrate rather than litigate all disputes arising from their agreement. That result cannot be reconciled with *Stolt-Nielsen*. *A fortiori*, the agreement does not reflect evidence of a clear and unmistakable intent to authorize class arbitration.

As a result, the judgment below should be reversed.

ARGUMENT

I. IMPOSITION OF CLASS ARBITRATION ABSENT AFFIRMATIVE CONTRACTUAL AUTHORIZATION VIOLATES THE FAA.

A. Arbitration Is A Matter Of Consent, Not Coercion.

The FAA's "central purpose" is "to ensure 'that private agreements to arbitrate are enforced according to their terms.'" *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53–54 (1995). Enacted to "overrule the judiciary's longstanding refusal to enforce agreements to arbitrate," *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 219–20 (1985), the FAA's central provision mandates that arbitration agreements covered by the Act "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2. The FAA thus ensures that both "courts and arbitrators must 'give effect to the contractual rights and expectations of the parties.'" *Stolt-Nielsen*, 130 S. Ct. at 1773–74; *accord Concepcion*, 131 S. Ct. at 1752 ("Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations."); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) (the FAA "is at bottom a policy guaranteeing the enforcement of private contractual arrangements").

Unlike litigation, therefore, arbitration is purely "a matter of consent, not coercion." *Volt Info. Scis., Inc.* v. *Bd. of Trs.*, 489 U.S. 468, 479 (1989). In litigation, the plaintiff can unilaterally require the defendant to submit to the authority of the court, whose power to resolve the dispute derives, not from the parties' agreement, but from a legislative grant of authority. The parties cannot choose which judge will decide the case; nor can they choose the rules of procedure the court will follow. These and other aspects of the proceeding are prescribed by law.

Arbitration is different. Unlike a court, an arbitrator "'is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept.'" *United Steelworkers of Am.* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960). Rather, "arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." *AT&T Techs.*, 475 U.S. at 648–49; *accord Stolt-Nielsen*, 130 S. Ct. at 1774 ("an arbitrator derives his or her powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution"). And unlike in litigation, where a party can be haled into court without its consent, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Warrior & Gulf*, 363 U.S. at 582; *accord Volt*, 489 U.S. at 478 ("the FAA does not require parties to arbitrate when they have not agreed to do so").

Moreover, because arbitration is a creature of contract, "parties are generally free to structure their arbitration agreements as they see fit." *Volt*, 489 U.S. at 479. "[T]he FAA does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that 'arbitration proceed *in the manner provided for in [the parties'] agreement.*'" *Id.* at 474–75 (emphasis and alteration in *Volt*) (quoting 9 U.S.C. § 4). As a result, the parties may "specify by contract the rules under which th[e] arbitration will be conducted." *Id.* at 479. They may also exclude certain claims or parties from the arbitration, for "nothing in the statute authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement." *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 289 (2002); see also *Stolt-Nielsen*, 130 S. Ct. at 1774 ("parties may specify *with whom* they choose to arbitrate their disputes"); *Volt*, 489 U.S. at 478 (parties may "exclud[e] certain claims from the scope of their arbitration agreement").

In short, under the FAA, the parties are free to choose the terms of the arbitration, and neither courts nor arbitrators may "'force the parties to arbitrate in a manner contrary to their agreement.'" *Volt*, 489 U.S. at 472. An arbitrator who does so exceeds his powers under the FAA. See 9 U.S.C. § 10(a)(4) (authorizing judicial vacatur of an arbitral award "where the arbitrators exceeded their powers"); *Stolt-Nielsen*, 130 S. Ct. at 1767 (an arbitrator exceeds his powers when he "strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice") (internal quotation marks and alteration omitted).

B. Class-Wide Arbitration Is Fundamentally Different From Traditional Arbitration.

Class arbitration reflects a stark break from traditional arbitration, whereby a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors*, 473 U.S. at 628. Far from effectuating the parties' agreement, compelling class arbitration absent affirmative authorization fundamentally transforms the bargain the parties struck when they agreed to bilateral arbitration. See *Con-*

cepcion, 131 S. Ct. at 1753 (class arbitration "is not arbitration as envisioned by the FAA"); *Stolt-Nielsen*, 130 S. Ct. at 1776 (class arbitration "fundamental[ly] changes" arbitration). That is so in at least three critical respects.

First, class arbitration dramatically increases the stakes of arbitration and the risk to defendants of an adverse decision. In a class arbitration, the arbitrator's decision "no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties." *Stolt-Nielsen*, 130 S. Ct. at 1776. As a result, the defendant's financial exposure is magnified exponentially. Even if the defendant would face the same number of individual claims, resolving those claims through multiple bilateral arbitrations allows the defendant to spread the risk of an erroneous decision across multiple decision makers. Class arbitration, by contrast, concentrates that risk in a single proceeding, forcing the defendant to stake potentially devastating liability on a single arbitrator's decision. See *Concepcion*, 131 S. Ct. at 1752; *Bazzle*, 539 U.S. at 459 (Rehnquist, C.J., dissenting) (class arbitration "concentrat[es] all of the risk of substantial damages awards in the hands of a single arbitrator").

These concerns are compounded by the limited judicial review of the arbitrator's final award. As this Court has recognized, the narrow scope of judicial review makes arbitration "poorly suited to the higher stakes of class litigation." *Concepcion*, 131 S. Ct. at 1752; see also *Stolt-Nielsen*, 130 S. Ct. at 1776 ("the commercial stakes of class-action arbitration are comparable to those of class-action litigation, even though the scope of judicial review is much more limited") (citation omitted). Class arbitration forces defendants to "bet the company with no effective means of review." *Concepcion*, 131 S. Ct. at 1752.[2]

Second, class arbitration greatly increases the cost, duration, and procedural complexity of arbitration. Arbitration is viewed as an attractive alternative to litigation precisely because it offers "'streamlined proceedings and expeditious results.'" *Preston* v. *Ferrer*, 552 U.S. 346, 357 (2008); see also *Hall Street Assocs., L.L.C.* v. *Mattel, Inc.*, 552 U.S. 576, 588 (2008) (emphasizing "arbitration's essential virtue of resolving disputes straightaway"); *Mitsubishi Motors*, 473 U.S. at 633 ("it is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts [parties] to forgo access to judicial remedies" in favor of arbitration).

Class arbitration, by contrast, "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Concepcion*, 131 S. Ct. at 1751. Before even reaching the merits of the parties' claims, the arbitrator "must first decide, for example, whether the class itself may be certified, whether the named parties are sufficiently representative and typical, and how discovery for the class should be conducted." *Id.* The AAA's rules, moreover, contemplate significant judicial involvement in this process, providing for stays of the proceedings to allow parties to seek judicial review of both the arbitrator's conclusion that the arbitration agreement authorizes class arbitration and the arbitrator's decision to certify a class. Pet. App. 96a–97a (Rules 3, 5(b)). The predictable result is that class arbitrations take much longer and cost much more to resolve than bilateral arbitrations—if they are ever litigated to a final decision at all. See *Concepcion*, 131 S. Ct. at 1751 (citing statistics showing that class arbitrations take on average 3.5 times longer than bilateral arbitrations and rarely result in an award on the merits).

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[2] Given these dynamics, class counsel can use class arbitration to extort settlements from defendants regardless of the ultimate merits of the underlying claims. Even when a company has a meritorious defense, "the risk of an error will often become unacceptable." *Concepcion*, 131 S. Ct. at 1752. "Defendants are willing to accept the costs of these errors in [bilateral] arbitration, since their impact is limited to the size of individual disputes, and presumably outweighed by savings from avoiding the courts." *Id.* But when a single erroneous decision could cripple the company, few defendants will have the fortitude to press on, even if they are likely to prevail. "Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *Id.* This "'in terrorem'" effect of class-action litigation is well documented, "and class arbitration would be no different." *Id.*

Third, it remains unclear whether class arbitration is even capable of yielding a judgment binding on all parties. For example, whether and under what conditions a defense award from an FAA arbitration may be enforced against absent class members is a critical but unsettled question. Even if the arbitrator were to observe all the procedural formalities required to bind absent class members to a court judgment, see *id.* (discussing requirements of notice, opportunity to be heard, and right to opt out), absent class members may argue that they are not bound by the arbitrator's decision, for example, because (1) their arbitration agreements do not authorize class arbitration or (2) they were not afforded their contractual right to participate in the selection of the arbitrator. As a result, class arbitration may not even yield one of the most basic benefits of bilateral arbitration—a "mutual, final, and definite award." 9 U.S.C. § 10(a)(4).

Given these significant disadvantages of class arbitration, the Court in *Concepcion* concluded it was "hard to believe" that defendants would *ever* consent to class arbitration. 131 S. Ct. at 1752. And, it is precisely for these reasons, as discussed next, that the Court in *Stolt-Nielsen* held that class arbitration so fundamentally changes the nature of arbitration that arbitrators may not conclude, "consistent with their limited powers under the FAA," that the parties authorized class arbitration merely by agreeing to submit their disputes to arbitration. 130 S. Ct. at 1776.

C. Under *Stolt-Nielsen*, A Standard Agreement To Arbitrate "Any Dispute" Arising From A Contract Is An Insufficient Basis To Impose Class Arbitration.

In *Stolt-Nielsen*, this Court granted certiorari "to decide whether imposing class arbitration on parties whose arbitration clauses are 'silent' on that issue is consistent with the [FAA]." 130 S. Ct. at 1764. The arbitration clause in that case provided that "'[a]ny dispute arising from the making, performance or termination'" of the parties' contract would be settled in arbitration. *Id.* at 1765. The parties had stipulated that "the arbitration clause was 'silent' with respect to class arbitration," *i.e.*, that "'no agreement'" had been reached on that issue. *Id.* at 1766. The arbitrators nonetheless ordered the parties into class arbitration, concluding that "the arbitration clause allowed for class arbitration" because the defendants had failed to "show an intent to preclude class arbitration," and because otherwise there would be "no basis for a class action absent express agreement among all parties and the putative class members." *Id.* (internal quotation marks and alteration omitted).

This Court held that the arbitrators had exceeded their powers under the FAA by ordering class arbitration without a contractual basis. *Id.* at 1767–76. Because "the central or primary purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms," in enforcing and construing arbitration provisions, "courts and arbitrators must give effect to the contractual rights and expectations of the parties." *Id.* at 1773–74 (internal quotation marks omitted). "This is because an arbitrator derives his or her powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution." *Id.* at 1774.

Given the "foundational FAA principle that arbitration is a matter of consent," the Court held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 1775. Further, because class arbitration "fundamental[ly] changes" the nature of arbitration, the Court held that, under the FAA, an arbitrator may not infer an "implicit agreement to authorize class-action arbitration . . . solely from the fact of the parties' agreement to arbitrate." *Id.* at 1775–76. In other words, in construing an arbitration clause, an arbitrator may not "presum[e] the parties consented to [class arbitration] by simply agreeing to submit their disputes to an arbitrator." *Id.* at 1775.

Although the Court in *Stolt-Nielsen* did not have occasion to define what contractual bases would be sufficient to authorize class arbitration under the FAA, *id.* at 1776 n.10, the Court's holding necessarily entails at least the following two propositions: (1) when the parties have not reached an agreement as to class arbitration, federal substantive law supplies the default rule—"the parties cannot be compelled to submit their dispute to class arbitration," *id.* at 1776; and (2) a contract term that merely evidences the parties' agreement to arbitrate rather than litigate their disputes is an insufficient basis upon which to impose class arbitration, *id.* at 1775 (class arbitration "is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate").

D. The Decision Below Is Contrary To The Standards Set Forth In *Stolt-Nielsen*.

The decision below is squarely at odds with *Stolt-Nielsen*'s holding that, under the FAA, arbitrators may not infer an agreement to authorize class arbitration solely from the parties' agreement to arbitrate. The arbitrator in this case inferred an agreement to authorize class arbitration based solely on standard arbitration language providing that "[n]o civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration." Pet. App. 93a. By ordering arbitration based on this standard arbitration clause, which reflects nothing more than the parties' agreement to arbitrate, the decision below is no less "at war with the foundational FAA principle that arbitration is a matter of consent" than was the arbitrators' decision in *Stolt-Nielsen*. 130 S. Ct. at 1775.

Most arbitration provisions contain a general clause requiring the parties to arbitrate "any" or "all" disputes relating a specified subject matter. See *Reed* v. *Fla. Metro. Univ., Inc.*, 681 F.3d 630, 642 (5th Cir. 2012) ("The 'any dispute' clause is a standard provision that may be found, in one form or another, in many arbitration agreements."); *Hornbeck Offshore (1984) Corp.* v. *Coastal Carriers Corp. (In re Complaint of Hornbeck Offshore (1984) Corp.)*, 981 F.2d 752, 755 (5th Cir. 1993) (collecting cases involving such clauses). For example, the American Arbitration Association's guidance on drafting arbitration agreements suggests the following standard language: "Any controversy or claim arising out of or relating to this contract . . . shall be settled by arbitration . . . ." Am. Arbitration Ass'n, *Drafting Dispute Resolution Clauses: A Practical Guide* 7 (Sept. 1, 2007); see also JAMS ADR Clauses (Jan. 1, 2011), http://www.jamsadr.com/clauses ("Any dispute, claim or controversy arising out of or relating to this Agreement . . . shall be determined by arbitration . . . ."). Indeed, the arbitration agreement this Court held insufficient to authorize class arbitration in *Stolt-Nielsen* included such a clause. 130 S. Ct. at 1765 (quoting clause requiring "'[a]ny dispute'" arising from parties' contract to be settled by arbitration).

Such a clause reflects nothing more than "the fact of the parties' agreement to arbitrate." *Id.* at 1775. By its terms, a general clause requiring all disputes arising from the parties' contract to be submitted to arbitration establishes only that the parties agreed to arbitrate rather than litigate their disputes, and says nothing about whether they agreed to authorize class arbitration. As *Stolt-Nielsen* made clear, the ability to represent a class is not somehow inherent in the concept of arbitration such that a court or arbitrator would be justified in supplying such a term as "necessary to give effect to the parties' agreement." *Id.* To the contrary, the Court held, "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Id.*

Under *Stolt-Nielsen*, therefore, a clause that simply requires parties to arbitrate rather than litigate their disputes is "not a valid contractual basis upon which to conclude that the parties agreed to submit to class arbitration." *Reed*, 681 F.3d at 643; see also Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 Marq. L. Rev. 1103, 1155 (2011) ("A general arbitration clause, according to the *Stolt-Nielsen* Court, does not authorize class arbitration because class arbitration differs too much from individual arbitration.").

Thus, if the arbitration agreement at issue here had included only the second clause ("all such disputes shall be submitted to final and binding arbitration"), it would scarcely be debatable that the arbitrator exceeded his powers under the FAA by ordering class arbitration. The arbitrator, however, purported to discern an intent to authorize class arbitration in the initial clause providing that "'[n]o civil action concerning any dispute arising under this Agreement shall be instituted before any court.'" Pet. App. 46a. But that clause cannot authorize class arbitration, as it simply confirms that the agreement to arbitrate disputes covered by the agreement is mandatory rather than permissive, *i.e.*, that the parties have authorized arbitration as a mechanism to resolve their disputes, *and* have waived their right to litigate those disputes in a civil action in court. Accordingly, together, both clauses reflect only "the parties' agreement to arbitrate." *Stolt-Nielsen*, 130 S. Ct. at 1775. Under *Stolt-Nielsen*, that is not a sufficient "contractual basis for concluding that the party *agreed*" to class arbitration. *Id.*

Moreover, here, the arbitrator's conclusion that the arbitration clause "vest[s] in the arbitration process everything that is prohibited from the court process" is contrary to the FAA. Pet. App. 47a. If that were true, then the parties would be entitled to a jury trial and all the other procedural rights attending civil litigation. But the entire reason parties agree to arbitration is to *forgo* the procedural rigor and associated burdens of litigation. Cf. *Concepcion*, 131 S. Ct. at 1747 (rejecting notion that an arbitration agreement can be deemed unconscionable if it fails to afford all procedures inherent in litigation). As the Fifth Circuit correctly held, "the mere fact that the parties would otherwise be subject to class action in the absence of an arbitration agreement is not a sufficient basis to conclude that they agreed to class arbitration when they entered into an arbitration agreement." *Reed*, 681 F.3d at 643.

Because the arbitrator's contrary conclusion here has no basis in the parties' actual consent to class arbitration, and rests on nothing more than the parties' agreement to arbitrate, under *Stolt-Nielsen*, the arbitrator exceeded his powers under the FAA when he ordered the parties into class arbitration.

II. THE FAA PROHIBITS CLASS ARBITRATION ABSENT CLEAR AND UNMISTAKABLE AUTHORIZATION BY THE PARTIES.

Separately, the decision below should be set aside because, under the FAA, class arbitration may not be imposed absent clear and unmistakable authorization by the parties. Requiring clear and unmistakable evidence of a contractual intent to authorize class arbitration would effectuate the federal policy favoring arbitration by (1) ensuring that parties' agreements to arbitrate are enforced according to their terms, *Volt*, 489 U.S. at 479, and (2) addressing concerns that an arbitrator "would not be constrained to resolve only those disputes that the parties have agreed in advance to settle by arbitration," *AT&T Techs.*, 475 U.S. at 651. Under that standard, the decision below must be set aside because there can be no showing that the parties clearly and unmistakably expressed an intent to authorize class arbitration.

A. The Enforceability Of Arbitration Agreements Under The FAA Is A Matter Of Federal Law.

Section 2 of the FAA "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). "While the interpretation of an arbitration agreement is generally a matter of state law, the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'" *Stolt-Nielsen*, 130 S. Ct. at 1773 (internal citations omitted) (quoting *Volt*, 489 U.S. at 479). The FAA imposes these federal standards to promote private arbitration by "ensuring that private agreements to arbitrate are enforced according to their terms." *Volt*, 489 U.S. at 479.

For example, the FAA establishes that, where specific contracting parties have agreed to arbitrate their disputes, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone*, 460 U.S. at 24–25. This federal rule of law effectuates the FAA's underlying purpose: "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate." *Dean Witter*, 470 U.S. at 219–20.

Conversely, the FAA promotes arbitration by imposing constraints on arbitrators to prevent them from exceeding the scope of their authority over the parties. *E.g.*, 9 U.S.C. § 10(a)(4). For example, in *First Options* v. *Kaplan*, 514 U.S. 938 (1995), the Court addressed the showing required under the FAA to establish that the parties agreed to assign to the arbitrator the threshold issue of arbitrability. *Id.* at 944. The Court explained that although courts "generally" "should apply ordinary state-law principles that govern the formation of contracts," the FAA imposed a different requirement when the issue was whether the parties "agreed that the arbitrators should decide arbitrability." *Id.* Specifically, the Court held that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *Id.* (second and third alterations in original) (quoting *AT&T Techs.*, 475 U.S. at 649). Thus, mere contractual "silence or ambiguity" on this threshold issue was insufficient under the FAA to express the parties' intent to authorize the arbitrator to resolve the question of arbitrability. *Id.* at 945.

First Options, in turn, relied heavily on the analysis in *AT&T Technologies*, 475 U.S. at 651. There, the Court explained, in the context of labor arbitration, that the "clear and unmistakable" evidence requirement was necessary because "[t]he willingness of parties to enter into agreements that provide for arbitration of specified disputes would be 'drastically reduced' . . . if . . . [an] arbitrator had the 'power to determine his own jurisdiction.'" *Id.* (quoting Cox, *Reflections on Labor Arbitration*, 72 Harv. L. Rev. 1482, 1509 (1959)). The Court continued that, "[w]ere this the applicable rule, an arbitrator would not be constrained to resolve only those disputes that the parties have agreed in advance to settle by arbitration." *Id.*

As shown below, these principles likewise compel the conclusion that class arbitration may not be imposed under the FAA absent clear and unmistakable evidence that the parties agreed to authorize it.

B. Under The FAA, Clear And Unmistakable Evidence Of Intent Is Required To Authorize Class Arbitration.

As noted above, in *Stolt-Nielsen*, the Court had no occasion "to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration." 130 S. Ct. at 1776 n.10. Although the Court can resolve this case based on the holding in *Stolt-Nielsen*, the Chamber submits that the Court should establish that clear and unmistakable evidence of intent is necessary to authorize class arbitration. That standard would ensure the FAA's important goals and policies are carried out by courts and arbitrators.

First, as the Court recognized in *Concepcion* and *Stolt-Nielsen*, there are fundamental differences between bilateral arbitration and class arbitration. See *Concepcion*, 131 S. Ct. at 1750–53 (class arbitration sacrifices the informality of bilateral arbitration, requires additional procedural formality, "greatly increases the risk to defendants," and is "poorly suited to the higher stakes of class litigation"); *Stolt-Nielsen*, 130 S. Ct. at 1776 ("changes brought about by the shift from bilateral arbitration to class-action arbitration" are "fundamental"). Such a dramatic shift in the nature of the proceedings makes it unlikely the parties would have authorized class arbitration absent an express statement in the agreement to that effect.

In light of the vastly different nature of class proceedings, the Court has questioned whether a defendant *ever* would agree to class arbitration. *Concepcion*, 131 S. Ct. at 1753 ("We find it hard to believe that defendants would bet the company with no effective means of review . . . ."); *Stolt-Nielsen*, 130 S. Ct. at 1776 ("the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings").[8] At the very minimum, there is "reason to doubt the parties' mutual consent to resolve disputes through class-wide arbitration." *Stolt-Nielsen*, 130 S. Ct. at 1775–76 (citing *First Options*, 514 U.S. at 945).

Requiring "clear and unmistakable" evidence that the parties agreed to authorize class arbitration would better effectuate the parties' intent because bilateral arbitration is the default expectation given that "[a]rbitration is poorly suited to the higher stakes of class litigation." *Concepcion*, 131 S. Ct. at 1752. Because it is unlikely the parties would have implicitly contemplated a seismic shift to class arbitration, a requirement of clear and unmistakable evidence ensures that the parties' agreement to arbitrate will not inadvertently be transformed in a manner to which they have not assented. See *Stolt-Nielsen*, 130 S. Ct. at 1775–76 (ruling that arbitrator may not infer an "implicit agreement to authorize class-action arbitration").

Second, requiring a showing of "clea[r] and unmistakabl[e]" evidence of intent to authorize class arbitration would address concerns that arbitrators will not "be constrained to resolve only those disputes that the parties have agreed in advance to settle by arbitration." *AT&T Techs.*, 475 U.S. at 649, 651; see also *First Options*, 514 U.S. at 945. Such concerns are substantial given data regarding the strong tendency of arbitrators to conclude that they, in fact, have been authorized to conduct lengthy and costly class arbitration proceedings. For example, the American Arbitration Association has reported that arbitrators issued Clause Construction Awards that concluded that arbitration clauses *authorized* class arbitration in 70 percent (95 of 135) of the class arbitrations administered by the AAA between 2003 and 2009. See Br. of American Arbitration Association as *Amicus Curiae* in Support of Neither Party at 22, *Stolt-Nielsen*, 130 S. Ct. 1758 (filed Sept. 4, 2009). Indeed, in only 5 percent of those cases (7 of 135) did an arbitrator conclude that the parties had not authorized class arbitration. *Id.*[4]

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[8] Indeed, until recently, the issue whether parties authorized class-wide arbitration was purely an academic exercise. Although the FAA was enacted in 1925, the first serious analysis of class arbitration occurred more than 50 years later. See Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1, 38 (2000) (citing *Keating* v. *Superior Court*, 167 Cal. Rptr. 481 (Cal. Ct. App. 1980)). And the American Arbitration Association did not publish rules addressing class arbitrations until 2003, after this Court's decision in *Bazzle*.

Allowing arbitrators to expand "their jurisdiction" to encompass class-wide arbitration on the basis of contractual "silence" or perceived contractual "ambiguity" would "'drastically reduc[e]'" the "willingness of parties to enter into agreements that provide for arbitration of specified disputes." *AT&T Techs.*, 475 U.S. at 651; cf. *Concepcion*, 131 S. Ct. at 1752 n.8 ("It is not reasonably deniable that requiring consumer disputes to be arbitrated on a classwide basis will have a substantial deterrent effect on incentives to arbitrate."). Allowing arbitrators essentially unfettered discretion to expand the scope of their authority by ordering class arbitration based upon flimsy or ambiguous contractual bases thus would contravene "the foundational FAA principle that arbitration is a matter of consent." *Stolt-Nielsen*, 130 S. Ct. at 1775; see also Pet. Br. 37-38 ("[C]lass arbitration determinations are ones that even the best-intentioned arbitrator may find it difficult to approach with complete impartiality.").

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[4] The remaining 24 percent (33 of 135) of the AAA Clause Construction Awards were resolved through stipulations by the parties that class arbitration had been authorized. Br. of American Arbitration Association 22.

Doing so would frustrate the legitimate expectations of thousands of companies that have entered into arbitration agreements containing "any dispute" clauses. Countless such arbitration provisions exist and will generate future disputes. Thus, even if companies could draft around the decision below in future agreements, nothing would prevent arbitrators from undermining companies' existing agreements. These companies would never have imagined that merely by agreeing to submit their disputes to arbitration and precluding resort to litigation they were subjecting themselves to the significant burdens and risks of class arbitration. Given the limited commercial history of class arbitration, including, until very recently, the lack of any guidance regarding how such an arbitration should proceed, it would be fanciful to believe that the parties consented to class arbitration simply by agreeing to submit all their disputes to mandatory arbitration. See *Concepcion*, 131 S. Ct. at 1748 ("The 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.'") (alteration in original) (quoting *Volt*, 489 U.S. at 478).

Finally, applying that standard here, the decision below should be set aside because there is no clear and unmistakable evidence of intent by the parties to authorize class-wide arbitration. As explained above, under *Stolt-Nielsen*, "[a]n implicit agreement to authorize class-action arbitration . . . is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate." 130 S. Ct. at 1775. It follows, *a fortiori*, that the parties' adoption of a standard arbitration clause does not qualify as "clear and unmistakable" evidence of the parties' intent to authorize class-wide arbitration.

CONCLUSION

For these reasons, and those set forth in petitioner's brief, the decision below should be reversed.

Respectfully submitted,

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OXFORD HEALTH PLANS LLC

Petitioner,

v.

JOHN IVAN SUTTER, M.D.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI — The Voice of the Defense Bar ("DRI") is an international organization of more than 23,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Consistent with this commitment, DRI seeks to address issues germane to defense attorneys, to promote the role of the defense attorney, and to improve the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair and efficient. To that end, DRI regularly files *amicus curiae* briefs in cases that raise issues of concern to its members.

Arbitration is an issue of particular interest since DRI members often advise or represent clients in drafting contracts and in subsequent proceedings. Frequently, such contractual disputes address the enforceability of arbitration agreements. Based on the informed interest and relevant experience of its members, DRI has submitted several *amicus* briefs in recent years in cases presenting issues under the Federal Arbitration Act (FAA). *E.g.*, *Am. Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 594 (cert. granted Nov. 9, 2012); *AT&T Mobility LLC v.*

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[1] Letters of consent have been filed with the Clerk. Pursu[illegible] to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

Concepcion, 131 S. Ct. 1740 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010).

DRI and its members thus have a vital interest in the issues presented in this case. In light of its members' extensive practical experience, DRI is uniquely well suited to explain why this Court should reverse the Third Circuit's opinion.

INTRODUCTION AND SUMMARY OF ARGUMENT

Arbitration agreements are commonplace in every corner of the economy, and parties expect that such agreements will be honored in accordance with the terms to which they consented. Consistent with the strong market preference for arbitration, federal law and the laws of many states favor this alternative form of dispute resolution precisely because it is inexpensive, streamlined, and efficient. As this Court has recognized, class arbitration is, in contrast to bilateral arbitration, a markedly different procedure that offers none of these advantages. It is costly, risky, and cumbersome – the very attributes that generally motivate parties to choose traditional bilateral arbitration over litigation in the first place.

Compelling parties to resolve disputes through costly, time-consuming, and high-stakes class-wide arbitration, when the parties have not agreed to do so, frustrates the parties' intent, undermines their agreements, and erodes the benefits offered by arbitration as an alternative to litigation. Imposing class arbitration on parties who have not agreed to that procedure conflicts with the central goal of the Federal Arbitration Act (FAA): to ensure that arbitration agreements are enforced strictly according to the terms adopted by the parties. The FAA ensures not only that arbitration agreements are enforceable, but also that hostility to arbitration is not permitted to transform arbitration by replicating the most expensive and formal aspects of judicial proceedings.

Arbitrators and lower courts that misapply this Court's precedents have subjected defendants to complex, high-stakes, class arbitration procedures to which they never agreed. That result is incompatible with the principle that contractual agreement is the cornerstone on which the arbitration system rests. Even worse, defendants coerced into class arbitration are deprived of substantial rights, including the benefits of finality and repose, even if they prevail on the merits. That result is incompatible with the principal justifications for permitting class action litigation even in the courts, *viz.*, class-wide finality and repose. Under such a regime, with "millions of dollars and perhaps the company's future at risk," and absent "the safeguards litigation provides[,] the consequences of an unreviewable arbitral error are so great that arbitration is no longer a viable option." Clancy & Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 Bus. Law. 55, 71, 73-74 (2007) (citations omitted). The experience of DRI members confirms that these risks are real.

The Third Circuit in this case incorrectly imposed class-wide arbitration based solely on a clause in individual contracts that – without saying a word about class arbitration – merely required the parties to arbitrate all disputes. This decision is contrary to this Court's guidance, particularly in

Stolt-Nielsen, that an arbitrator may not order classwide arbitration when an arbitration agreement is "silent" on class arbitration. If allowed to stand, the decision below will adversely affect the judicial system and the rule of law by subjecting parties to expensive, protracted proceedings to which they never agreed when contracting for arbitration.

ARGUMENT

I. THE DECISION BELOW MISREADS THIS COURT'S PRECEDENTS

A. The Mistaken Foundation for the Recent Growth of Class Arbitration

Prior to *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), it was generally agreed that "absent an express provision in the parties' arbitration agreement, the duty to rigorously enforce arbitration agreements 'in accordance with the terms thereof' as set forth in section 4 of the FAA bars district courts from . . . requir[ing] consolidated arbitration, even where consolidation would promote the expeditious resolution of related claims." *Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269, 274-75 (7th Cir. 1995) (citing numerous circuit decisions holding same). After *Bazzle* – and based on a misperception of this Court's disposition – some courts concluded that class arbitration could proceed as long as the contract did not "forbid" class arbitration. In other words, class arbitration proceeded if the agreement was merely "silent" on the issue. *See, e.g., Shroyer v. New Cingular Wireless Servs.*, 498 F.3d 976, 992 (9th Cir. 2007) (reading *Bazzle* to be an "implicit endorsement" of class arbitration); *Trumper v.*

Travelers Indem. Co., 2006 WL 6553086, at *1 (S.D. Tex. Jan. 9, 2006) ("class arbitration is permissible under the FAA wherever the governing contract does not expressly prohibit such arbitration," citing *Bazzle*).

Such rulings led to an explosion of classwide arbitrations. In relatively short order, the American Arbitration Association ("AAA") and the Judicial Arbitration & Mediation Services ("JAMS") implemented class arbitration procedures for the first time. *See* AAA Supp. Rules for Class Arbitrations (eff. Oct. 8, 2003), *available at* http://adr.org/sp.asp?id=21936; JAMS Class Action Procedures (eff. May 1, 2009), *available at* http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Class_Action_Procedures-2009.pdf. As a mechanism for arbitrators to decide the availability of class arbitration in a given case, both the AAA and JAMS procedures call for a "clause construction" award that determines not whether the parties actually "agreed" to class arbitration, but merely whether the contract "permits" class arbitration (AAA), or "can proceed on behalf of a class" (JAMS). *See* AAA Supplementary Rules for Class Arbitrations, Rule 3; JAMS Class Action Procedures, Rule 2.

Since arbitrators viewed their task at that stage as solely to determine, in effect, whether the arbitration agreement *did not forbid* class actions (and thereby "permitted" them), it is not surprising that arbitrators frequently interpreted silent arbitration agreements to "permit" class actions. A study found that as of August 2008, 65 out of 67 silent arbitration agreements - or 97% had been interpreted by arbitrators to authorize class arbitration. Baker, *Class Action Arbitration*, 10 Cardozo J. of Conflict Resol. 335, 348 (2009). To the same effect, the AAA *amicus* brief in *Stolt-Nielsen* reported that in 102 "clause construction awards" where the parties contested whether class arbitration was permitted, class arbitration prevailed in 95 cases. Brief of AAA at 22, *Stolt-Nielsen v. AnimalFeeds Int'l Corp.*, No. 08-1198, *available at* http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_07_08_08_1198_NeutralAmCuAAA.authcheckdam.pdf (hereinafter "AAA *Stolt-Nielsen* Brief"); *see also* Brief of CTIA - The Wireless Association at 11 & Appendix, *Stolt-Nielsen v. AnimalFeeds Int'l Corp.*, No. 08-1198, *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-1198_PetitionerAmCuCTIA.pdf.

This empirical data is supported by comments directly from arbitrators. As one acknowledged:

> the overwhelming majority of Clause Construction Awards under [AAA] Class Arbitration Rules have held that, where the arbitration clause contains broad language similar to that here, and is silent on whether a class proceeding is contemplated or not, class arbitration is permitted.

Partial Final Clause Construction Award And Rulings on Respondents' Motions To Dismiss at 9, *Depianti v. Bradley Mktg Enters., Inc.*, AAA No. 11 114 00838 07 (AAA Aug. 1, 2008) *available at* http://www.adr.org/si.asp?id=5442; *accord* Clancy, *Re-Evaluating Bazzle: The Supreme Court's Celebrated 2003 Decision Says Much Less About Class Action Arbitration Than Many Assume*, 7 Class Action Lit. Rpt. (BNA) 649, 2 (2006) (noting that arbitrators issuing decisions overwhelmingly favor class arbitration – even where there is no evidence the parties intended to allow it).

B. This Court Corrects the Misreading of *Bazzle*

These misperceptions of *Bazzle* permeated the legal landscape until this Court explained in *Stolt-Nielsen* that

> [A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so. . . . The critical point, in the view of the arbitration panel, was that petitioners did not establish that the parties to the charter agreements intended to *preclude* class arbitration. . . . [T]he panel regarded the agreement's silence on the question of class arbitration as dispositive. The panel's conclusion is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent.

130 S. Ct. at 1775 (emphasis in original; internal quotations and citations omitted).

This Court anchored its holding on the bedrock principle that arbitration under the FAA is based on "consent, not coercion." *Id.* at 1773 (quoting

Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989)); *see also Granite Rock Co. v. Int'l Broth. of Teamsters*, 130 S. Ct. 2847, 2857 (2010) (same). Because "[t]he central purpose" of the FAA is "to ensure 'that private agreements to arbitrate are enforced according to their terms,'" parties may structure their arbitration agreements as they see fit, specify the governing rules, and specify *with whom* they choose to arbitrate their disputes. *Stolt-Nielsen*, 130 S. Ct. at 1773-74 (quoting *Volt*, 489 U.S. at 479).

Accordingly, an arbitrator may not infer an implicit agreement to authorize class-action arbitration from the absence of an explicit agreement "to *preclude* class arbitration." *Id.* at 1775 (emphasis in original). "[T]he differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." *Id.* at 1776.[2]

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[2] Consistent with that holding, the Court reiterated in *Concepcion* that imposing "manufactured" class arbitration on parties who had not agreed to it "interfere[d] with fundamental attributes of arbitration" and thus violated the FAA. *See* 131 S.Ct. 1748. Central to the Court's analysis is the recognition that "'changes brought about by the shift from bilateral arbitration to class-action arbitration' are 'fundamental,'" they "sacrifice[] the principal advantage of arbitration its informality and make[] the process slower, more costly, and more likely to generate procedural morass than final judgment. *Id.* at 1750, 1751 (quoting *Stolt-Nielsen*, 130 S. Ct. at 1776). Consequently, the Court once again concluded that class arbitration is "not arbitration as envisioned by the FAA" and

C. The Third Circuit Decision Effectively Nullifies *Stolt-Nielsen*

The Third Circuit's ruling in this case provides a roadmap for nullifying or evading *Stolt-Nielsen.* For example, the court of appeals relied heavily on the contract's "any dispute" language to support the arbitrator's finding of assent to class arbitration. But most arbitration agreements that are "silent" on class arbitration contain the same "any dispute" language. *See, e.g., Stolt-Nielsen,* 130 S. Ct. at 1765; *Reed v. Fla. Metro. Univ. Inc.*, 681 F.3d 630, 642-43 (5th Cir. 2012); *Jock v. Sterling Jewelers, Inc.*, 646 F.3d 114, 116 (2d Cir. 2011), *cert. denied,* 132 S. Ct. 1742 (2012).

As the Fifth Circuit correctly noted in identical circumstances, reliance on the "any dispute" language of an arbitration agreement to find assent to class arbitration effectively nullifies *Stolt-Nielsen. Reed,* 681 F.3d at 643 (a "class arbitration award based upon an 'any dispute' clause would be insufficient under *Stolt–Nielsen* [because] a general arbitration clause, according to the *Stolt–Nielsen* Court, does not authorize class arbitration because class arbitration differs too much from individual arbitration") (quotation and citation omitted); *accord Bernal v. Burnett,* 793 F. Supp.2d 1280, 1287-88 (D. Colo. 2011).

Similarly, even where an agreement contains no provision reflecting assent to class arbitration, a plaintiff will unilaterally have *carte blanche* to avoid

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therefore may not be required absent agreement of the parties. *Id.* at 1753.

Stolt-Nielsen simply by refusing to stipulate that there is "no agreement" on the subject. *Cf. Jock*, 646 F.3d at 129 n.2 (Winter, J., dissenting) ("Given my colleagues' narrow reading of the decision ... *Stolt-Nielsen* has been rendered an insignificant precedent"); *see also Goodale v. George S. May Int'l Co.*, 2011 WL 1337349, at *2 (N.D. Ill. Apr. 5, 2011) (rejecting argument that *Stolt-Nielsen* applies only where the parties "stipulated that there was no agreement between them to arbitrate class claims," and characterizing argument as an attempt to "split the finest of hairs").

The experience of DRI members bears out this concern. Subsequent to *Stolt-Nielsen*, many arbitrators and courts limited this Court's holding to the context of a stipulated "no agreement." Some have conjured up justifications for class arbitration in contracts that fall far short of affirmative "consent to resolve . . . disputes in class proceedings." *Stolt-Nielsen*, 130 S. Ct. at 1776.[3] This Court should close the pathway that allows such end-runs around its decisions.

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[3] *See, e.g., Yahoo! Inc. v. Iversen*, 836 F. Supp.2d 1007, 1012-13 (N.D. Cal. 2011); *Smith & Wollensky Rest. Group, Inc. v. Passow*, 2011 WL 148302, at *1 (D. Mass. Jan. 18, 2011); *La. Health Serv. Indem. Co. v. Gambro A B*, 756 F. Supp. 2d 760, 762 (W.D. La. 2010).

II. FLAWS IN THE THIRD CIRCUIT'S ANALYSIS PROVIDE ADDITIONAL REASONS FOR REVERSAL

A. The Third Circuit Decision Eliminates Vital Benefits of Arbitration

It is well-recognized that "[b]y agreeing to arbitrate . . . a party . . . trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 628 (1985). The benefits of arbitration have been repeatedly recognized by this Court: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes. *See, e.g., Concepcion,* 131 S. Ct. at 1749; *Stolt-Nielsen,* 130 S. Ct. at 1775; *accord* Rice, *Enforceable or Not? Class Action Waivers in Mandatory Arbitration Clauses and the Need for A Judicial Standard,* 45 Hou. L. Rev. 215, 246 (2008) ("Proponents of arbitration, and particularly of the mandatory arbitration clause, hail it as a boon to efficiency for our already-burdened judiciary as well as an economic advantage for both parties of a dispute").

Just as emphatically, however, the attributes of efficiency and simplicity do not exist in class arbitration, which by its nature is protracted, complex and public.[4] In contrast to the informality, streamlining, and expedition that are hallmarks of individual arbitration, class arbitration requires complex procedures that blur the distinction between litigation and arbitration. For example, the AAA's class arbitration rules largely replicate the federal rules of civil procedure. *See* AAA, Supplementary Rules for Class Arbitrations, *at* http://www.adr.org/sp.asp?id =21936. Therefore, just as in court, class arbitration requires discovery, full briefing, an evidentiary hearing, and a written ruling on class certification. If a class is certified, absent class members must be notified and given an opportunity to opt out. *Id.*, Rule 6. The parties must then engage in protracted and expensive merits discovery typical of high-stakes class litigation. And, finally, there must be a full hearing — with an opportunity for the defendant to present individualized defenses — and a written award on the merits. *Id.*, Rule 7. Alternatively, if there is a settlement, there must be another round of notice to class members, an opportunity to file objections, more briefing, a fairness hearing, and a written ruling. *Id.*, Rule 8.

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[4] *Cf.* Clancy & Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History,* 63 Bus. Law. at 72 (2007) ("class arbitration is a proceeding of profoundly different substance and scope, in

As these procedures confirm, the cost savings of individual arbitration do not translate to class arbitration. Indeed, since it entails substantial arbitrators' fees that have "no equivalent in a

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which many of millions of dollars and the company's future could be at stake"); Baker, *Class Action Arbitration*, 10 Cardozo J. of Conflict Resol. at 364 ("The fact that the procedural device of class treatment is not available in arbitration is part and parcel of arbitration's ability to offer simplicity, informality, and expedition characteristics that generally make arbitration an attractive vehicle for resolution of low-value claims").

traditional, judicial class action," class arbitration may prove even more expensive to the parties than its judicial counterpart. Clancy & Stein, *An Uninvited Guest*, 63 Bus. Law. at 64. At a minimum, it is clear that, unlike individual arbitration, class-wide arbitration is *not* a "less expensive alternative to litigation." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995).

Empirical data on class arbitration confirm that the procedure is just as cumbersome as a judicial class action, if not more so. AAA statistics show that "the median time frame from filing (an AAA class arbitration) to settlement, withdrawal, or dismissal is 583 days with a mean of 630 days." AAA *Stolt-Nielsen* Brief at 24. While 19–21 months might seem today to be a reasonable period in which to resolve the merits of a class dispute, that is not what these statistics reflect. Rather, 85% of the cases included in the average were terminated *before any ruling on class certification*—and *none* "resulted in a final award on the merits." AAA *Stolt-Nielsen* Brief at 24. Thus, like its court-administered counterpart, class-wide arbitration is likely to take years to complete. The delay inherent in class arbitration stands in stark contrast to the speed and efficiency of individual consumer arbitration, which, on average, results in an award on the merits in only six months—only four months if a customer elects to have the case decided on documentary submissions alone.[5]

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[5] AAA, *Analysis of the AAA's Consumer Arbitration Caseload*, *at* http://www.adr.org/si.asp?Id=5027.

Further examination of real experience with class arbitration reinforces the basis for concern with the decision below. As the AAA recited to this Court, of the 283 class arbitrations AAA administered "in the nearly six years that the Class Rules have been in effect no class arbitration conducted under the Rules has resulted in a final award on the merits[.]" AAA *Stolt-Nielsen* Brief at 22-23.

In that same *amicus* brief, AAA recounted statistics showing that the median and mean times for class arbitrations to traverse just the clause construction and class determination phases hovered around two years. *Id.* at 24; *accord Concepcion,* 131 S. Ct. at 1751 (citing statistics showing that class arbitration takes far longer than bilateral arbitration). And that was even before those cases reached any consideration of the merits. Specific cases, of course, can take much longer. As just one example, an arbitration that has been pending for almost five years has not progressed beyond the determination whether to proceed on a class-wide basis, and is still awaiting judicial consideration of the arbitrator's decision on that subject. *See Rivera, et al. v. Corinthian College, Inc., et al.,* No. 11 434 01075 08 (AAA claim filed May 28, 2008). Even if that case moves ahead, consideration of the merits will not even begin until more than five years after the arbitration commenced.

Aside from the added expense of such lengthy disputes over the administrative form proceedings will take, class arbitrations pose an unacceptable potential for abuse. Some have suggested that an inherent conflict of interest lurks in a situation where arbitrators, who are paid by the hour, decide whether the proceedings over which they preside will be simple, efficient and inexpensive, or complex, protracted and costly.[6] *Cf. Com. Coatings Corp. v. Cont. Cas. Co.*, 393 U.S. 145, 150 (1968) (vacating an arbitration award and holding that "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias").[7] Such concerns are reinforced by statistics indicating that arbitrators are more than twice as likely as judges to certify a class. According to the AAA, arbitrators granted 24 of the first 42 contested class-certification motions filed under the AAA rules—a grant rate of 57.14%. AAA *Stolt-Nielsen* Brief at 22. In contrast, studies of putative class actions filed in state and federal courts revealed a certification rate under 25%. *See* Willging & Wheatman, Attorney Choice of Forum in Class Action Litigation: What Difference Does it Make?, 81 Notre Dame L. Rev. 591, 645 (2006) (certification rate of 24%); Administrative Office of the California Courts, *Class Certification In California*, at A1, tbl.A-1 (Feb. 2010) (certification in 22.3% of 1,294 putative class actions terminated in California state courts), *available at http://www.courtinfo.ca.gov/reference/documents/classaction-certification.pdf*. *Accord In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) ("We have no reason to suppose that [a judge] wants to preside over an unwieldy class action").

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[6] *See, e.g.*, Clancy & Stein, *An Uninvited Guest*, 63 Bus. Law. at 73-74 (noting that arbitrators' rulings in class arbitration are "fraught with financial conflicts of interest" because "a decision to certify a class almost certainly would . . . increase the arbitrator's compensation for the case"); Deruelle & Roesch, *Gaming the Rigged Class Arbitration Game: How We Got Here and Where We Go Now – Part I*, The Metropolitan Corporate Counsel, August 2007, at p. 9, *available at* http://www.metrocorpcounsel. com/pdf/2007/August/09.pdf ("Simply put, arbitrators necessarily have a 'financial interest' in prolonging an arbitration, and especially a class arbitration, since the more time they devote to a case, the more money they will make"); Burch, *Necessity Never Made a Good Bargain: When Consumer Arbitration Agreements Prohibit Class Relief*, 31 Fla. St. U. L. Rev. 1005, 1031, 1034 (2004) ("Arbitrators may have a financial incentive to certify a class because the longer the arbitrator spends on the case the more money the arbitrator receives"); Carter, *High Court Says Let the Arbitrator Decide*, 2 No. 25 ABA J. E-Report 5 (June 27, 2003) (quoting chair of ABA Dispute Resolution Section's Arbitration Committee as saying "I think arbitrators will be inclined to find class action arbitration is appropriate because there is an economic incentive to do so"); *see generally* Powell & Bales, *Ethical Problems in Class Arbitration*, 2011 J. Disp. Resol. 309, 320-29 (2011).

[7] *Accord Tumey v. Ohio*, 273 U.S. 510, 523, 533 (1927) (a party "might . . . with reason" fear a judge who "has a direct, personal, substantial pecuniary interest in reaching a conclusion against him"); *Barcon Assoc., Inc. v. Tri-County*

Further, in the usual course, "the vast majority of certified class actions settle, most soon after certification." Bone & Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1291 (2002) ("[E]mpirical studies...confirm what most class action lawyers know to be true").[8]

Asphalt Corp., 430 A.2d 214, 219 (N.J. 1981) (arbitrators must "avoid not only actual partiality but also the appearance of partiality" because of "the need to maintain the integrity of arbitration and public faith in the process").

[8] *See also* Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009) ("With

The same trend holds for class arbitration. *See* Baker, *Class Action Arbitration*, 10 Cardozo J. of Conflict Resol. at 353-54 (noting that as of August 2008, no class arbitration cases had reached a decision on the merits "there being a tendency for many cases to settle after the class arbitration award"). This is because class actions place defendants in the untenable position of betting the company on the outcome without regard to the strength of plaintiffs' claim. Defendants face intense pressure to settle even if an adverse judgment seems "improbable." *See Thorogood v. Sears, Roebuck and Co.*, 547 F.3d 742, 745 (7th Cir. 2008); *accord Rhone-Poulenc*, 51 F.3d at 1298.

This Court has noted the "risk of 'in terrorem' settlements that class actions entail" because when "[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *Concepcion*, 131 S. Ct. at 1752 (citing *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672-677-78 (7th Cir. 2009)). As one court explained:

> When the potential liability created by a lawsuit is very great, even though the probability that the plaintiff will succeed in establishing liability is slight, the defendant will be under pressure to settle rather than to bet the company, even if the betting odds

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vanishingly rare exception, class certification [leads to] settlement, not full-fledged testing of the plaintiffs' case by trial"); Willging & Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591, 647 (2006) ("[A]lmost all certified class actions settle").

> are good. [The defendant] has good reason not to want to be hit with a multi-hundred-million-dollar claim that will embroil it in protracted and costly litigation—the class has more than a thousand members, and determining the value of their claims, were liability established, might thus require more than a thousand separate hearings.

Kohen, 571 F.3d at 677-78; *see Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC*, 2010 WL 3855552, at *28 (E.D. Pa. Sept. 30, 2010) (same).[9] Fear of negative publicity is also a motivating factor to settle even weak class claims. Chamblee, *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 La. L. Rev. 157, 222 (2004).

This pressure places extreme strain on the individuals and businesses DRI's members represent. Most starkly, the attendant costs of a major lawsuit amplified by the complex vagaries of class action treatment could sound the death knell for new or financially fragile companies. Bondi, *Facilitating Economic Recovery and Sustainable Growth Through Reform of the Securities Class-Action System: Exploring Arbitration as an Alternative to Litigation*, 33 Harv. J.L. & Pub. Pol'y 607, 612 (2010). The ripple effects of exorbitant settlements are felt throughout the economy and are particularly invidious when the enormity of potential classwide recovery masks a substantively non-meritorious case. *See, e.g.*, Bohn & Choi, *Fraud in the New-Issues Market: Empirical Evidence on Securities Class Actions*, 144 U. Pa. L. Rev. 903, 970 (1996) (describing "strike suits" designed to obtain "the defendants' cost savings from avoiding the litigation, distraction, and reputation costs of responding to the plaintiffs' complaint" rather than the true worth of the claim). The court of appeals' holding in this case, if left uncorrected by this Court, will exacerbate these problems and engender "blackmail settlements." *Rhone-Poulenc*, 51 F.3d at 1298 (citing Friendly, *Federal Jurisdiction: A General View* 120 (1973)).

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[9] *See also Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 168 (3d Cir. 2001) ("granting [class] certification may generate unwarranted pressure to settle nonmeritorious or marginal claims"); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("Class certification magnifies and strengthens the number of unmeritorious claims[. This] creates insurmountable pressure on defendants to settle.... The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low") (citations omitted); *accord* Barnett, *The Plaintiffs' Bar Cannot Enforce the Laws: Individual Reliance Issues Prevent Consumer Protection Classes in the Eighth Circuit*, 75 Mo. L. Rev. 207, 208 (2010) (similar point).

Even if the attendant costs of class arbitration do not imperil a defendant company's financial well-being, it is beyond cavil that the public will benefit if companies can protect themselves from the high costs of arbitration and/or paying frivolous class claims. "[W]hatever lowers costs to businesses tends over time to lower prices to consumers. . . . [T]he size of the price reduction caused by enforcement of consumer arbitration agreements will vary. . . . But it is inconsistent with basic economics to question the existence of the price reduction." Ware, *The Case*

For Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions And Arbitration Fees, 5 J. Am. Arb. 255-56 (2006); *accord* Rice, *Enforceable or Not?: Class Action Waivers in Mandatory Arbitration Clauses and the Need for A Judicial Standard,* 45 Hous. L. Rev. 215, 247 (2008) ("Because companies are able to keep their costs down by mitigating risk, they will pass cost savings on to the consumer in the form of lowered prices").[10]

B. Class Arbitration Lacks Many Procedural Safeguards Present in Judicial Litigation

All of the adverse practical ramifications of the Third Circuit decision are magnified further by the lack of procedural safeguards that plagues class arbitration. Given the "in terrorem" effects of blackmail settlements, this Court was exactly correct in finding it "hard to believe that defendants would bet the company with no effective means of review." *Concepcion,* 131 S. Ct. at 1752. *See Stolt-Nielsen,* 130 S. Ct. at 1775-76 ("In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes. But the relative benefits of a class-action arbitration are much less assured, giving reason to doubt the parties' mutual consent to resolve disputes through classwide arbitration").

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[10] In an analogous context, this Court has recognized that customers' whose contracts include a forum-selection clause "benefit in the form of reduced (prices) reflecting the savings that (a company) enjoys by limiting the fora in which it may be sued." *Carnival Cruise Line, Inc. v. Shute,* 499 U.S. 485, 594 (1991); *see also, e.g., Boomer v. AT&T Corp.,* 309 F.3d 404, 419 n.7 (7th Cir. 2002) ("arbitration offers cost-saving benefits to telecommunication providers and these benefits are reflected in a lower cost of doing business that in competition are passed along to customers") (quotation omitted).

Opportunities for judicial and appellate review are narrowly circumscribed in the arbitration context. The FAA provides that a court may vacate an arbitrator's substantive award of relief on the merits only in the event of fraud, corruption, bias, misconduct or misbehavior by the arbitrators, or where the arbitrators exceeded their powers or failed to make a "final and definite" award. *See* 9 U.S.C. §10(a). Judicial power to modify such an arbitration award is limited to cases involving material miscalculations or mistakes, errors in form, and rulings on issues not before the arbitrator. *See id.* §11. These grounds for review may not be expanded by agreement of the parties. *Hall Street Assoc's v. Mattel, Inc.*, 128 S. Ct. 1396 (2008). Such limitations on judicial review raise serious questions of fairness for all parties to class arbitration. For sound practical reasons, the fact that "decision(s) by the arbitrator with respect to class certification and an ultimate award are virtually non-appealable . . . terrifies corporate defendants." Clancy & Stein, *An Uninvited Guest*, 63 Bus. Law. at 71 (quotation omitted).

It is not only the lack of searching judicial review that makes class arbitration inherently perilous for defendants. Arbitration also lacks many salutary procedural mechanisms readily available in litigation, such as motions to dismiss and motions for summary judgment. *See* Fed. R. Civ. P. 12(b)(6) & 56. For example, this Court has recognized the values of pleading standards in class actions designed to ensure that meritless cases are dismissed at an early stage before a defendant is subjected to expensive and protracted discovery. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979) (holding, in class action context, that "district courts must be especially alert to identify frivolous claims brought to extort nuisance settlements..."). These procedures can end meritless and frivolous litigation before discovery or trial.

In arbitration, however, defendants lack the right to be heard on a motion to dismiss. Moreover, dispositive motions in arbitration are not encouraged and are rarely granted.[11] Indeed, "(s)ummary judgment in AAA arbitration is so rare as to be statistically insignificant." Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L. Rev. 105, 113 (2003).[12] This procedural limitation is widely accepted in bilateral arbitration as part and parcel of arbitration's informality and streamlined nature. In class arbitration, however, the unavailability of early dispositive motions exposes defendants to the expense of discovery and even a merits hearing on worthless claims. *Cf. Twombly*, 550 U.S. at 559 ("the threat of discovery expense will push cost-conscious defendants to settle even anemic cases"). Where the parties never expressly agreed to class arbitration, there is no supportable basis for unleashing such coercive pressure.

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[11] *See, e.g.*, Sherwyn, *Because it Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 1 Berkeley J. Emp. & Lab. L. 1, 27 & n. 122 (2003); Steinberg, *A Decade After McMahon: Securities Arbitration: Better for Investors Than the Courts?*, 62 Brooklyn L. Rev. 1503, 1513-14 & n. 56 (1996).

[12] Perhaps this characteristic of arbitration is an extension of the conventional wisdom that an award may be vacated because the arbitrator refused to hear enough evidence but not because he or she heard too much. *Cf.* 9 U.S.C. §10(a)(3).

Equally as important, a highly valued attribute of single party v. single party arbitration is the desire to preserve confidentiality. That benefit, too, is lost in class arbitration since such proceedings result in publicly available awards. Typically, arbitration awards are confidential (*see* AAA Supplementary Rule 9(a)) and arbitrators are discouraged from writing opinions explaining the rationale for their awards. *See, e.g., United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960); DOMKE ON COMMERCIAL ARBITRATION §29:06 (G. White rev. ed. 1984). But class arbitration is antithetical to confidentiality. In AAA class arbitrations, the parties can expect their demands and all rulings will be publicly posted on the Internet. *See generally* AAA Searchable Class Arbitration Docket, *available at* http://www.adr.org/sp.asp?id= 25562. That aspect of class arbitration poses a particular dilemma for defendants whose records and dealings with absent class members are subject to the strictures of privacy law – most especially, for example, educational institutions, medical and health related businesses, and employers. Aside from being fully counter-intuitive, there is no valid or principled basis for concluding that absent class members should lose their rights to confidentiality and privacy when someone else files a class-wide claim.

Finally, vital due process guarantees present in litigation are non-existent in class arbitration. Because arbitration agreements are binding only on parties, any potential class members who have no arbitration agreements, or whose agreements do not cover the dispute at issue, should be unaffected by the arbitrator's final award. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, this Court held that where a party has related disputes with two different parties – one with an arbitration agreement and one without – each case must proceed in a separate forum:

> [T]he relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement. Under the [FAA], an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement.

460 U.S. 1, 20 (1983) (emphasis in original; footnote omitted). It is well-settled, moreover, that a contract cannot bind a non-party. *See, e.g., EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

As a result, if an arbitrator issues an award in favor of the plaintiff class, the defendant(s) could still face additional litigation – even additional class litigation – from purported class members. Most directly, this threat exists from absent class members not subject to an arbitration agreement; but the threat exists as well from absent class members with arbitration agreements who did not receive the full panoply of due process notice and procedural regularity that must precede judgments in class action litigation. Although such burdens may reasonably be imposed on defendants whose contracts expressly permit class arbitration, it is an unreasonable onus with which to saddle defendants whose contracts do not.

Where parties (including absent class members) have entered into contracts that unambiguously specify class arbitration as a chosen method of dispute resolution, then the absence of such safeguards is something to which the parties have agreed. In those particular circumstances, fidelity to the contractual terms would warrant class arbitration. But where the parties (including absent class members) have not expressly waived their constitutional protections required for class actions, it is wrong to subject parties to class arbitration.

For all of these reasons, it would be a profound mistake to permit class arbitration to proceed where the contract does not unambiguously so provide. The rationale for this conclusion in the context of domestic contracts and disputes is even more compelling in the context of transnational contracts. Under the FAA, international arbitration contracts are subject to treaties and multilateral agreements. 9 U.S.C. §§ 202, 208. But, there is serious question whether class arbitration could satisfy even the most elementary requirements for an enforceable award under international standards to which the United States is a signatory. *See, e.g.*, Strong, ***Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns***, 30 U. Pa. J. Int'l 1, 46-47 (2008).

For example, the Rules of the Inter-American Commercial Arbitration Commission require that a request for arbitration must contain the names and addresses of the parties. Inter-American Commercial Arbitration Commission Rules, at Art. 3 (amended Apr. 1, 2002), *available at* http://www.adr.org/sp.asp?id=22093. Class arbitration fails that basic test. *Cf.*, Strong, ***Enforcing Class Arbitrations***, 30 U. Pa. J. Int'l at 44 ("neither [JAMS nor AAA] arbitral rules creates procedures that necessarily address civil law concerns [regarding notice] about representative actions").

Likewise, the Convention on Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, 330 U.N.T.S. 38 (1958), allows jurisdictions to decline to enforce a foreign arbitration award on various grounds, including where the award "contains decisions on matters beyond the scope of the submission to arbitration," *id.* at art. V(1)(d). It also allows signatories to refuse enforcement that "would be contrary to the public policy of [the enforcing] country." *Id.* at art. V(2)(b). Foreign jurisdictions may reach different conclusions on each of these issues when they confront involuntary class arbitration imposed by U.S. arbitrators on the basis of an "any dispute" clause. *See, e.g.*, Lew, Mistelis &

Kroll, *Comparative International Commercial Arbitration* (2003) ¶¶16-94 ("There is a real issue whether an arbitration award rendered in multiparty proceedings can be enforced"); *id.* ¶¶16-97 (similar).

Based on the extensive experience of its members, DRI submits that the decision below misreads this Court's precedents, misperceives the obligation to enforce arbitration agreements in accordance with their express terms, and misunderstands the realities of class action arbitration. Those fundamental errors should be corrected.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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v.

JOHN IVAN SUTTER, M.D.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council respectfully submits this brief as *amicus curiae*. The brief supports the position of Petitioner before this Court in favor of reversal.[1]

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes nearly 300 major U.S. corporations that collectively employ more than 19 million workers domestically. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and practices.

EEAC member companies, many of which conduct business in numerous states, are strongly committed to equal employment opportunity and seek to establish and enforce internal policies that are consistent with federal employment non-discrimination laws. This commitment extends to the prompt and effective resolution of employment disputes using arbitration and other forms of alternative dispute resolution. A number of EEAC member companies thus have adopted company-wide policies requiring the use of binding arbitration to resolve all employment-related disputes. Those policies primarily are designed to promote relatively prompt, informal resolution of individual disputes, thus avoiding costly, complex, and protracted litigation in state or federal court.

A three-judge panel of the Third Circuit below improperly deferred to an arbitrator's erroneous conclusion that a broadly-worded binding arbitration clause was sufficient on its face to find that the parties affirmatively intended to permit class arbitration, despite the agreement's silence regarding the availability of such procedures. In doing so, it failed to adhere to the basic principle that arbitration agreements are to be enforced in accordance with their terms.

Because of its interest and practical experience in this area, EEAC has filed *amicus curiae* briefs supporting the enforceability of arbitration agreements in numerous cases before this Court, including *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70 (1998), *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000), *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, __ U.S. __, 130 S. Ct. 1758 (2010); *Rent-A-Center, W., Inc. v. Jackson*, __ U.S. __, 130 S. Ct. 2772 (2010); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); and, most recently, *American Express Co. v. Italian Colors Rest.*, No. 12-133 (filed July 30, 2012). Accordingly, EEAC has a level of knowledge and expertise that makes it uniquely well-positioned to brief the Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

In 1998, Oxford Health Plans entered into a professional services contract with one of its healthcare providers, Dr. John Ivan Sutter. Pet. App. 1a-2a. The contract contained a standard arbitration clause, which provides:

> No civil action concerning any dispute arising under this agreement shall be instituted before

> any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the Rules of the American Arbitration Association with one arbitrator.

Pet. App. 2a.

In 2002, Sutter filed a breach of contract action in New Jersey state court in which he sought to proceed on behalf of a class of contracted physicians. *Id.* The state court granted Oxford's motion to refer the case to arbitration, leaving it to the arbitrator to resolve whether class proceedings would be available in that forum. Pet. App. 3a. The arbitrator deferred consideration of the question pending this Court's decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003). J.A. 28-29.

Thereafter, the arbitrator found that the broad language of the arbitration clause "must have been intended to authorize class actions in arbitration," J.A. 32, pointing out that the clause broadly prohibited "civil actions" in court, and that class actions in court were a type of prohibited "civil action." *Id.* He surmised that "to avoid a finding that such was the parties' intention, it would be necessary for there to be an express exception for class actions in the prohibition," which "cannot be inferred absent some clear manifestation of such intent." *Id.* The arbitrator observed further that if class arbitration were not permitted, the broad prohibition on court actions "would mean that class actions are not possible in any forum. In my view, that reading cannot be inferred in the absence of a clear expression that such a bizarre result was intended." *Id.*

This Court subsequently held in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* that where an arbitration agreement is silent as to the availability of such procedures, class arbitration may not be imposed "unless there is a contractual basis for concluding" that the parties, in fact, intended to allow for it. __ U.S. __, 130 S. Ct. 1758, 1775 (2010). Imposing class arbitration in the absence of such proof, the Court observed, "is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent." *Id.*

Oxford asked the arbitrator to reconsider his original class arbitration determination in light of *Stolt-Nielsen*. Pet. App. 4a. The arbitrator agreed that *Stolt-Nielsen* was controlling authority, but distinguished it on the ground that his ruling had been based on "the parties' intent as evidenced by the words of the arbitration clause," which he had concluded "unambiguously evinced an intention to allow class arbitration, indeed to require it." J.A. 70. After unsuccessfully moving to vacate the arbitrator's clause construction award in federal district court, Oxford appealed to the Third Circuit, which affirmed. Pet. App. 5a, 17a-18a.

The Third Circuit acknowledged that "an arbitrator oversteps [the limits placed on his authority], and subjects his award to judicial vacatur under Section 10(a)(4) [of the Federal Arbitration Act], when he decides an issue not submitted to him, grants relief in a form that cannot be rationally derived from the parties' agreement and submissions, or issues an award that is so completely irrational that it lacks support altogether." Pet. App. 7a. It also observed that "when the arbitrator strays from interpretation and appreciation of the agreement and effectively dispenses his own brand of industrial justice, he exceeds his powers and his award will be unenforceable," Pet. App. 8a (internal quotations omitted), noting in particular that "an arbitrator may exceed his powers by ordering class arbitration without authorization." *Id.*

Nevertheless, according broad deference to the arbitrator's findings, and distinguishing *Stolt-Nielsen* primarily on the ground that plaintiffs' counsel there had conceded the lack of any actual agreement on the question of class arbitration, the court below declined to review the award, finding that the arbitrator "did articulate a contractual basis for his decision to order class arbitration." Pet. App. 14a. After its Petition for Rehearing/Rehearing En Banc was denied, J.A. 9, Oxford Health filed a petition for a writ of certiorari, which this Court granted on December 7, 2012. *Id.*

SUMMARY OF ARGUMENT

This Court repeatedly has emphasized that a principal aim of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 *et seq.*, is to construe private arbitration agreements in accordance with the parties' desire and expectations. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, __ U.S. __, 130 S. Ct. 1758, 1775-76 (2010). The "FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995). To the contrary, courts are to "rigorously enforce agreements to arbitrate ... in order to give effect to the contractual rights and expectations of the parties." *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 458 (2003) (citations and internal quotations omitted). *See also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,* *Inc.*, 473 U.S. 614, 626 (1985) ("as with any other contract, the parties' intentions control"). The Third Circuit's decision below disregards that basic principle.

In *Stolt-Nielsen, S.A. v. AnimalFeeds International Corp.*, __ U.S. __, 130 S. Ct. 1758 (2010), this Court held that under the FAA, a party to an arbitration agreement cannot be forced to submit to class arbitration procedures "unless there is a contractual basis for concluding that the party agreed to do so," *id.* at 1775, making clear that "[a]n implicit agreement to authorize class-action arbitration" is insufficient. *Id.* Despite the Court's unequivocal ruling that class procedures cannot be compelled unless plainly authorized by the parties, the court below has concluded that a broadly-worded arbitration clause is enough to evince such an affirmative intent. Its holding not only is inconsistent with the FAA's longstanding aims and objectives, but also fails to keep faith with this Court's well-established guidance reaffirming the strong public policy favoring bilateral arbitration of private disputes.

While *Stolt-Nielsen* does not address directly what constitutes a sufficient "contractual basis" on which to find that the parties to an arbitration agreement effectively – if not explicitly – agreed to the availability of class arbitration procedures, it plainly cautions arbitrators not to "presume, consistent with their limited powers under the FAA, that the parties' mere silence ..." is enough to make such a finding. 130 S. Ct. at 1776. To the contrary, arbitrators must establish that the parties affirmatively "agree[] to authorize class arbitration, not merely that they fail to bar such a proceeding." *Reed v. Fla. Metro. Univ.*, 681 F.3d 630, 644 (5th Cir. 2012) (citation omitted).

Inasmuch as the court below failed to adhere to these legal standards, but rather allowed the arbitrator to rely on ubiquitous arbitration clause language arbitrarily to permit one party to benefit from terms on which there was no meeting of the minds, it erred.

Because the chasm between bilateral arbitration and class arbitration is wide and deep, arbitrators must exercise great caution before imposing the latter in the absence of express contractual language authorizing such procedures. Perhaps even more so than other types of claims, class-wide arbitration of employment disputes "changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Stolt-Nielsen*, 130 S. Ct. at 1775.

Put simply, if employers wished to be subject to class-wide arbitration, they would express as much in the terms of their arbitration agreements. The fact that few, if any, do so should further highlight the folly in construing an agreement that is silent on the question as affirmatively allowing class arbitration. Such an approach, far from enforcing the contract as agreed to by *both* parties, perpetuates the very "judicial suspicion of the desirability of arbitration," *Mitsubishi*, 473 U.S. at 626-27, the FAA was designed to reverse.

ARGUMENT

I. BECAUSE ARBITRATION IS A MATTER OF MUTUAL CONSENT, CLASS PROCEDURES MAY NOT BE IMPOSED UNLESS IRREFUTABLE EVIDENCE EXISTS THAT THE UNDERLYING AGREEMENT ALLOWS FOR SUCH PROCEDURES

The Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, which provides that arbitration agreements "shall be valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, embodies the "congressional declaration of a liberal federal policy favoring arbitration agreements ...." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *see also Nitro-Lift Techs., LLC v. Howard*, __ U.S. __, 133 S. Ct. 500, 503 (2012). It "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 n.8 (1995) (citation and footnote omitted).

Inexplicably, the court below held that the parties affirmatively "agreed to authorize class arbitration" based solely on their use of broad contractual language precluding litigation and requiring arbitration of any dispute arising under their contract. To the extent that the decision below impermissibly conflicts with the plain text of the FAA and is inconsistent with well-established legal principles reiterated time and again by this Court, it must be reversed.

A. This Court Repeatedly Has Reaffirmed The Fundamental Principle That Arbitration Is A Matter Of Mutual Consent, Not Coercion

"[T]he FAA imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter or consent, not coercion.'" *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, __ U.S. __, 130 S. Ct. 1758, 1773 (2010) (citation omitted); *see also Rent-A-Center, W., Inc. v. Jackson*, __ U.S. __, 130 S. Ct. 2772, 2776 (2010) (the FAA "reflects the fundamental principle that arbitration is a matter of contract"). As this Court observed nearly three decades ago, "'[the] preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, a concern which 'requires that [courts] rigorously enforce agreements to arbitrate.'" *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26 (1985) (citation omitted). Thus, "[w]hether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must 'give effect to the contractual rights and expectations of the parties.'" *Stolt-Nielsen*, 130 S. Ct. at 1773-74 (quoting *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 479 (1989)); *see also AT&T Mobility LLC v. Concepcion*, __ U.S. __, 131 S. Ct. 1740, 1745 (2011) ("In line with these principles, courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms") (citations omitted).

In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991), this Court held that an arbitration agreement that an employee signed as a condition of employment, in which he pledged to submit to individual arbitration any employment-related dispute, was enforceable under the FAA, so as to require him to arbitrate his claim that his employer engaged in unlawful discrimination in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq*. In so doing, the Court made clear that as a general rule, "having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." 500 U.S. at 26 (citation omitted). *Gilmer* thus epitomizes the principle that "the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Boyd*, 470 U.S. 213, 218 (1985) (citations omitted).

B. Where An Arbitration Agreement Is Silent As To The Availability Of Class Arbitration, *Stolt-Nielsen* Proscribes The Forced Imposition Of Such Procedures In The Absence Of A "Contractual Basis" For Doing So

In *Stolt-Nielsen*, this Court held that as a general rule, "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." 130 S. Ct. at 1775. It made clear that "[a]n implicit agreement to authorize class-action arbitration" is insufficient, especially since permitting class procedures "changes the nature of arbitration" significantly. *Id*. Despite the Court's admonition in *Stolt-Nielsen* that class procedures cannot be compelled unless plainly and unambiguously authorized by the parties, the court below nevertheless erroneously concluded that a broadly worded arbitration clause is enough to evince such an affirmative intent.

The Court in *Stolt-Nielsen* declined to elaborate on the meaning of "contractual basis" in that context, though lower courts interpreting the term have applied far more robust a standard than did the court below. In *Reed v. Florida Metropolitan University*, for instance, the Fifth Circuit rejected an arbitrator's conclusion that that a broadly worded arbitration clause similar to the one at issue here implicitly authorized class arbitration procedures. 681 F.3d 630 (5th Cir. 2012). It determined that under *Stolt-Nielsen*, more than the mere *"fact of the parties' agreement to arbitrate"* is required to establish a contractual basis for ordering class arbitration. *Id.* at 642. Rather:

> For a court to read additional provisions into [a] contract, the implication must clearly arise from the language used, or be indispensible to effectuate the intent of the parties. It must appear that the implication was so clearly contemplated by the parties that they deem it unnecessary to express it.

Id. at 643 n.10 (citations omitted).

In construing a standard arbitration clause[2] (which on its face makes no mention of class arbitration procedures, much less confirms they are "indispensible to effectuate" the parties' intent) as establishing a "contractual basis" for ordering class arbitration, the court below failed to adhere to the FAA's requirement that agreements to arbitrate be enforced as they are written.

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[2] The type of "any dispute" clause in question here is common, particularly in arbitration agreements that have been in place for many years. *See Reed v. Fla. Metro. Univ.*, 681 F.3d 630, 642 (5th Cir. 2012) ("any dispute" clause "is a standard provision that may be found, in one form or another, in many arbitration agreements") (citations omitted).

Even prior to *Stolt-Nielsen*, most courts of appeals held that the FAA precludes the imposition of class-based arbitration or consolidation of individual arbitrations where the arbitration agreement itself is silent as to the availability of such procedures. *See, e.g., Hartford Accident & Indem. Co. v. Swiss Reinsurance Am. Corp.*, 246 F.3d 219 (2d Cir. 2001); *see also Gov't of the United Kingdom v. Boeing Co.*, 998 F.2d 68 (2d Cir. 1993); *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000); *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145 (5th Cir. 1987); *American Centennial Ins. Co. v. National Cas. Co.*, 951 F.2d 107 (6th Cir. 1991); *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995); *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720 (8th Cir. 2001); *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir. 1984); *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814 (11th Cir. 2001). Some went a step further, expressing the logical view that class arbitration categorically is unavailable in the absence of contract language *expressly* authorizing the procedure. In *Champ v. Siegel Trading Co.*, for example, the Seventh Circuit ruled that the FAA prohibits a court from ordering class-wide arbitration "absent a provision in the parties' arbitration agreement providing for class treatment of disputes ... ." 55 F.3d 269, 271 (7th Cir. 1995). It determined that since the arbitration agreement at issue was silent as to class arbitration, "[f]or a federal court to read such a term into the parties' agreement would 'disrupt[] the negotiated risk/benefit allocation and direct[] [the parties] to proceed with a different sort of arbitration.'" *Id.* at 275 (citation omitted).

Here, not only did the court below disregard the fact that the arbitration agreement in question did not contain an express class arbitration authorization clause, but it allowed the arbitrator to rely on standard, boilerplate language commonly found in such agreements to infer the availability of class procedures. It appears that in doing so, the arbitrator acted upon a lack of understanding as to the purpose and role of the class action device, misconstruing it as a substantive, rather than procedural, right. He found, for instance, that because a class action "is plainly one of the possible forms of *civil action* that could be brought in court, the agreement's requirement that all "civil actions" be subject to arbitration must envision class-based arbitration.

In general, however, there is no categorical "right" to bring a class action lawsuit. Rather, the class action device is a procedural mechanism, "arising under Fed. R. Civ. P. 23, that may be waived by agreeing to an arbitration clause." *Johnson v. West Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000).

C. Parties May Waive The Availability Of Judicial Class Action Procedures In Exchange For The Many Advantages Of Individual Arbitration

Indeed, parties to arbitration agreements often agree to streamlined procedural mechanisms that do not allow for claims to be brought on a class-wide basis. In doing so, they do not trade away any substantive rights, but rather exchange "'the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Gilmer*, 500 U.S. at 31 (citation omitted); *see also 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009) ("the relative informality of arbitration is one of the chief reasons that parties select arbitration").

The parties may decide, for instance, to "limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit *with whom* a party will arbitrate its disputes." *Concepcion*, 131 S. Ct. at 1748-49 (citations omitted); *see also 14 Penn Plaza*, 556 U.S. at 265-66 ("[t]he decision to resolve ... claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace ... discrimination; it waives only the right to seek relief from a court in the first instance"). The ability to bring a class action is just one of many procedural tools that can be waived in a valid arbitration agreement.

In other words, when parties agree to submit their disputes to binding arbitration, "they relinquish the right to certain procedural niceties which are normally associated with a formal trial. One of those 'procedural niceties' is the possibility of pursuing a class action under Rule 23." *Champ*, 55 F.3d at 276 (citations omitted); *see also Vaden v. Discover Bank*, 556 U.S. 49, 76 (2009) ("A big part of arbitration is avoiding the procedural niceties of formal litigation"). Thus, parties to valid arbitration agreements are free to – and routinely do – contractually waive their right to access the Rule 23 class action procedure.

As one commentator has observed:

> Class action suits are a procedural mechanism for seeking redress of a grievance, and therefore do not define the substantive rights or remedies

> available to either party. In fact, if the availability of class actions abridges, enlarges, or modifies the substantive rights of parties, then Rule 23 would violate the Rules Enabling Act and would be unconstitutional.

Joshua S. Lipshutz, *The Court's Implicit Roadmap: Charting the Prudent Course at the Juncture of Mandatory Arbitration Agreements and Class Action Lawsuits*, 57 Stan. L. Rev. 1677, 1714-15 (2005) (footnotes omitted). Furthermore:

> While the principles underlying courtroom procedures are highly valued by our judicial system – the right to a jury, appealability, openness – they are waived by a contractual decision to submit disputes to arbitration. *If arbitration consisted of all of the same procedures as litigation, there would be no benefit to arbitration at all.*

Id. (footnote omitted) (emphasis added). This is especially true in the employment context, in which many employers have adopted alternative dispute resolution programs with a mandatory arbitration component primarily in an effort to reduce litigation costs and to minimize ill will between the parties to a dispute.

Allowing an arbitration to proceed as a class action even where the contract does not expressly allow for it would profoundly undermine the efficiencies of arbitrating workplace disputes. "Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation … ." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23 (2001). In particular:

> The time and cost of pursuing a claim through traditional methods of litigation present the most glaring and formidable obstacles to relief for employment discrimination victims. While it might not make a difference to the upper level managerial worker who can afford the services of an expensive lawyer, and who can withstand the grueling process of litigation, those employees who are less financially sound are chronically unable to attract the services of a quality lawyer. For example, experienced litigators maintain that good plaintiff's attorneys will accept only one in a hundred discrimination claimants who seek their help. For those claimants who are denied the services because of their financial situation, the simpler, cheaper process of arbitration is the most feasible recourse.

Craig Hanlon, *Reason Over Rhetoric: The Case for Enforcing Pre-Dispute Agreements to Arbitrate Employment Discrimination Claims*, 5 Cardozo J. Conflict Resol. 2 (2003).

The financial and other benefits that the parties derive from employment arbitration are likely to disappear altogether if they are forced to submit to complex, class-based arbitration even where the underlying agreement does not provide for class arbitration procedures. In addition to increasing the costs, adjudicating claims on a class-wide basis brings a level of complexity that undermines many of the core advantages of arbitration. As this Court pointed out in *Stolt-Nielsen*:

> Consider just some of the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration. An arbitrator chosen according to an agreed-upon procedure no

> longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties ... thus potentially frustrating the parties' assumptions when they agreed to arbitrate. The arbitrator's award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well. And the commercial stakes of class-action arbitration are comparable to those of class-action litigation ....

130 S. Ct. at 1776 (citations omitted).

In class-based employment litigation brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*., for instance, each class member may recover up to $300,000 in compensatory and punitive damages, plus back pay and attorneys' fees, but only after overcoming any individual defenses offered by the defendant and proving individual damages. Attempting to resolve these complex issues in a class arbitration would remove all of the efficiencies of the arbital forum, while at the same time disallowing the built-in protections that inure to both plaintiffs and defendants through full judicial review. *See Wal-Mart Stores, Inc. v. Dukes*, __ U.S. __, 131 S. Ct. 2541 (2011).

Indeed, the significantly higher costs and exposure posed by class actions in general, and employment class actions in particular, places great pressure, especially on multinational employers, to settle rather than run even a small risk of catastrophic loss. *See, e.g. Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (characterizing it as "judicial blackmail"); *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1241 n.21 (11th Cir. 2000) (same). This is equally true in the case of class arbitration:

> [W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted the risk of "in terrorem" settlements that class actions entail, and class arbitration would be no different.

Concepcion, 131 S. Ct. at 1752 (citation omitted).

II. CLASS ARBITRATION IS FUNDAMENTALLY AT ODDS WITH THE FAA'S POLICY AIMS AND OBJECTIVES

If courts or arbitrators were free to order classwide arbitration even in the absence of any language expressly authorizing such procedures, employers would be faced with the very litigation burdens and acrimony they sought to avoid by introducing arbitration in the first place, thus undermining the FAA's longstanding policy objective to facilitate and promote bilateral arbitration. *See* Imre S. Szalai, *Aggregate Dispute Resolution: Class and Labor Arbitration*, 13 Harv. Negotiation L. Rev. 399, 428 (2008) (noting that "a lengthy, technical class procedure in arbitration would appear contrary to the understanding of arbitration as expressed in the FAA's legislative history"). As this Court observed in *Concepcion*:

> Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some

> expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties. *The conclusion follows that class arbitration, to the extent it is manufactured ... rather than consensual, is inconsistent with the FAA.*

131 S. Ct. at 1750-51 (emphasis added).

Arbitration by its very nature is designed to promote, rather than discourage, cost-effective resolution of individual claims in as non-adversarial a manner as possible. Allowing an arbitration to proceed on a class-wide basis where the parties have not agreed to do so defeats most, if not all, of those aims. Thus, "the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." *Stolt-Nielsen*, 130 S. Ct. at 1776 (footnote omitted).

Contrary to the universal guiding principles of common contract and federal statutory law, the court below improperly permitted Respondent to proceed in arbitration on a class wide basis, even though the underlying agreement does not authorize resort to such procedures. This inexcusable failure to give effect to the terms of the arbitration agreement as written is inconsistent with the FAA and fails to adhere to the Court's admonitions in *Stolt-Nielsen* that class arbitration may not be imposed in the absence of unequivocal evidence that the parties intended to be so bound. Accordingly, the decision below must be reversed.

CONCLUSION

For the foregoing reasons, the *amicus curiae* Equal Employment Advisory Council respectfully submits that the decision of the court of appeals should be reversed.

Respectfully submitted,

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No. 12-135

IN THE

Supreme Court of the United States

OXFORD HEALTH PLANS LLC,
Petitioner,

v.

JOHN IVAN SUTTER, M.D.,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation ("NELF") seeks to present its views, and the views of its supporters, on the issue presented in this case, namely whether the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), as interpreted by this Court in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), requires a court to vacate an arbitral award authorizing class arbitration where there is no contractual basis to justify such an award.[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include both large and small businesses located primarily in the New England region.

NELF has frequently filed amicus briefs in this Court on issues arising under the FAA that affect the rights of businesses in their contractual relationships with other businesses and with individuals. See *Am. Express Co. v. Italian Colors Restaurant*, *cert. granted* 2012 WL 3096737 (U.S. Nov. 9, 2012) (No. 12–133); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Hall St. Assocs., L.L.C., v. Mattel, Inc.*, 552 U.S. 576 (2008); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

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[1] Pursuant to Supreme Court Rule 37.6, NELF states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Supreme Court Rule 37.2(a), NELF also states that, on January 8, 2013, and on January 9, 2013, counsel for Respondent and counsel for Petitioner respectively filed with this Court a general written consent to the filing of amicus briefs, in support of either or neither party.

As NELF's participation in these cases illustrates, NELF is committed to the use of arbitration as a viable alternative forum for resolving disputes. NELF is also committed to the related principle that arbitration "is a matter of consent, not coercion . . . ." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1773 (2010) (citation and internal quotation marks omitted). In this connection, NELF strongly opposes the imposition of class actions in arbitration where, as here, the parties have agreed merely to arbitrate their disputes and, therefore, as a matter of law, have not consented to classwide arbitration.

The Third Circuit's decision in this case is of direct importance to NELF's business constituents, many of whom make use of standard predispute arbitration clauses in their commercial agreements. If allowed to stand, the Third Circuit's decision could permit arbitrators or courts to "interpret" boilerplate arbitration clauses as warranting the imposition of class arbitration, contrary to both *Stolt-Nielsen* and the businesses' intent. The Third Circuit's decision must be reversed to honor this Court's precedent that a business's mere consent to arbitration cannot mean that the business has "bet the company" on the enormous risks and uncertainties of class arbitration, and "with no effective means of review" under the FAA. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011). For these and other reasons discussed below, NELF believes that its brief would provide an additional perspective to aid this Court in deciding the issues presented in this case.

SUMMARY OF ARGUMENT

The Third Circuit has erroneously deferred to an arbitrator's "interpretation" of a boilerplate predispute arbitration clause as authorizing the imposition of class arbitration. The arbitration clause at issue merely provides that the parties have agreed to arbitrate "any dispute arising under this Agreement." Under *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010), the parties have "simply agree[d] to submit their disputes to an arbitrator." Therefore, the parties have not consented to class arbitration as a matter of law. Their standard "any dispute" arbitration clause cannot provide the contractual basis required under *Stolt-Nielsen* to authorize class arbitration. Accordingly, *Stolt-Nielsen* requires vacatur of an arbitral award of class arbitration where, as here, the facts of a case cannot provide a contractual basis to justify such an award.

Stolt-Nielsen recognizes that the changes brought about by class arbitration are substantially disadvantageous to businesses. Therefore, businesses are presumed *not* to have consented to class arbitration where, as here, they have simply agreed to arbitrate disputes. Parties must *agree* to override this potent default term of bilateral arbitration under the FAA. The parties in this case have simply agreed to submit "any dispute under this Agreement" to binding arbitration. Each word in this standard arbitration clause is enlisted solely to serve the parties' intent to arbitrate and not litigate their disputes. Therefore, the parties have not agreed to authorize class arbitration.

If allowed to stand, the Third Circuit's decision could render *Stolt-Nielsen* a nullity by requiring courts to defer to arbitral awards of class arbitration where, as here, there is clearly no contractual basis for doing so. The lower court's decision could effectively result in the imposition of class arbitration as a mandatory implied term in any bare agreement to arbitrate disputes, despite *Stolt-Nielsen*'s clear holding to the contrary. Moreover, the Third Circuit's decision could effectively permit the imposition of class arbitration as a mandatory implied term in virtually *every* commercial arbitration agreement, because the boilerplate "any dispute" arbitration clause at issue is ubiquitous in the case law and is endorsed by the prominent national arbitration associations.

Finally, the Third Circuit's deference to an arbitral award that plainly violates *Stolt-Nielsen*'s contractual basis requirement under the FAA is entirely misplaced. To be sure, the FAA may require judicial deference to an arbitrator's erroneous interpretation of a statute *other than* the FAA. However, the FAA "cannot be held to destroy itself." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011). That is, the FAA cannot be interpreted to require judicial deference to an arbitral award that violates the FAA's core purposes by imposing class arbitration without the parties' mutual consent.

ARGUMENT

I. *STOLT-NIELSEN* REQUIRES VACATUR OF AN ARBITRAL AWARD OF CLASS ARBITRATION WHERE, AS HERE, THE PARTIES HAVE SIMPLY AGREED TO ARBITRATE THEIR DISPUTES AND THEREFORE HAVE NOT CONSENTED TO CLASS ARBITRATION.

In this case, the Third Circuit has deferred to an arbitrator's "interpretation" of a boilerplate predispute arbitration clause as authorizing the imposition of class arbitration. *Sutter v. Oxford Health Plans LLC*, 675 F.3d 215 (3d Cir. 2012). The arbitration clause at issue merely provides that the parties have agreed to arbitrate, and not litigate, "any dispute arising under this Agreement."[2] Under this Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), the parties have "simply agree[d] to submit their disputes to an arbitrator[,]" and nothing more. *Id.*, 130 S. Ct. at 1775. Therefore, "it cannot be presumed [that] the parties consented to [class arbitration]" based on this mere agreement to arbitrate disputes. *Id.* *Stolt-Nielsen* instructs that such a bare arbitration clause cannot, as a matter of law, provide the contractual basis necessary to authorize class arbitration under the FAA. *See id.*,

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[2] In particular, the parties' arbitration clause provides that "[n]o civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the Rules of the American Arbitration Association with one arbitrator." *Sutter. v. Oxford Health Plans*, 675 F.3d at 217.

130 S. Ct. at 1775. Accordingly, the arbitrator's award in this case must be vacated as *ultra vires* under § 10(a)(4) of the FAA. The Third Circuit's decision cannot stand. [3]

In *Stolt-Nielsen*, this Court held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.*, 130 S. Ct. at 1775. In that case, the Court vacated an arbitral award of class arbitration under § 10(a)(4) of the FAA because the record established that there was no contractual basis supporting such an award. *See id.* at 1776 n.10. Under *Stolt-Nielsen*, then, the FAA requires vacatur of an arbitral award of class arbitration whenever the facts of a case preclude a contractual basis to justify such an award.

This is such a case. The parties here have merely agreed to arbitrate "any dispute arising under this Agreement." In *Stolt-Nielsen*, the Court concluded that such a generic arbitration clause, in which the parties have merely agreed to arbitrate their disputes, cannot provide a contractual basis authorizing class arbitration. "[C]lass-action arbitration changes the nature of [bilateral] arbitration to such a degree that it cannot be presumed the parties consented to it by *simply agreeing to submit their disputes to an arbitrator.*" *Id.* at 1775 (emphasis added).

The Court in *Stolt-Nielsen* therefore announced a rule of contract interpretation under the FAA, applicable here, that a mere agreement to arbitrate disputes cannot provide a contractual basis authorizing class arbitration. Such an agreement only authorizes bilateral arbitration. "An implicit agreement to authorize class-action arbitration . . . is not a term that the arbitrator may infer *solely from the fact of the parties' agreement to arbitrate.*" *Id.* at 1775 (emphasis added).

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[3] Section 10(a)(4) of the FAA authorizes a federal court to vacate an arbitral award "where the arbitrators exceeded their powers." 9 U.S.C. § 10(a)(4).

The Court based this important principle on the FAA's "basic precept that arbitration is a matter of consent, not coercion . . . ." *Id.* at 1773 (citation and internal quotation marks omitted). As the Court explained in exhaustive detail, in both *Stolt-Nielsen* and *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), "'the changes brought about by the shift from bilateral arbitration to class-action arbitration' are 'fundamental.'" *Concepcion*, 131 S. Ct. at 1750 (quoting *Stolt-Nielsen*, 130 S. Ct. at 1776). In brief, class arbitration transforms the simplicity and efficiency of bilateral arbitration into a costly, complex and high-risk proceeding that virtually evades judicial review under the FAA. *Stolt-Nielsen*, 130 S. Ct. at 1775-76; *Concepcion*, 131 S. Ct. at 1750-52.

In light of these substantial disadvantages wrought by class arbitration, a business is presumed *not* to have consented to class arbitration where, as here, it has "simply agree[d] to submit [the parties'] disputes to an arbitrator . . . ." *Stolt-Nielsen*, 130 S. Ct. at 1775. After all, arbitration is presumptively a simple bilateral affair under the FAA. *See Concepcion*, 131 S. Ct. at 1751, 1753. Parties must *agree* to override this potent default term of bilateral arbitration. "[W]e see the question as being whether the parties *agreed to authorize* class arbitration."

Stolt-Nielsen, 130 S. Ct. at 1776. The FAA therefore requires a separate, identifiable contractual basis, quite apart from the parties' basic agreement to arbitrate disputes, to warrant an order of class arbitration. *See id*., at 1775-76. A mere agreement to arbitrate disputes, as in this case, lacks any such contractual basis as a matter of law. *See id*. at 1775. This rule of contract construction under the FAA jibes with the Court's recent observation that "[w]e find it hard to believe that defendants would bet the company [on class arbitration] with no effective means of review . . . ." *Concepcion*, at 1752.

Applying *Stolt-Nielsen* to the arbitration clause at issue here compels the conclusion that the parties did not agree to authorize class arbitration and, therefore, that the arbitral award must be vacated. The parties have simply agreed to submit "any dispute under this Agreement" to binding arbitration. Each word in this standard arbitration clause is enlisted solely to serve the parties' intent to arbitrate and not litigate their disputes.

Under *Stolt-Nielsen*, such spare contractual language can function only as a "simpl[e] agree[ment] to submit [the parties'] disputes to an arbitrator . . . ." *Id*. at 1775. The parties' "any dispute" clause therefore forecloses any possible contractual basis authorizing class arbitration. *See id*. As one lower court recently concluded, when considering a virtually identical arbitration clause, "[o]n its face, the 'any dispute' clause merely reflects an agreement between the parties to arbitrate their disputes." *Reed* v. *Florida Metro. Univ., Inc.*, 681 F.3d 630, 642 (5th Cir. 2012) (vacating arbitral award of class arbitration under *Stolt-Nielsen*).

As with the parties' stipulation in *Stolt-Nielsen* that they had not reached any agreement on class arbitration, *id*. at 1768, the parties' arbitration clause in this case "le[aves] no room for an inquiry regarding the parties' intent" on the issue of class arbitration. *Id*. at 1770. Where, as here, the parties "simply agree[] to submit their disputes to an arbitrator," *id*. at 1775, the contract affords no ambiguity or room for "interpreting" any consent to classwide arbitration. In this situation, *Stolt-Nielsen* instructs that no deference is due an arbitral award to the contrary. "[W]hen an arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice[,] . . . his decision may be unenforceable." *Id*. at 1767 (citation and internal quotation marks and brackets omitted).

If allowed to stand, the Third Circuit's decision could render *Stolt-Nielsen* a nullity by requiring courts to defer to arbitral awards of class arbitration where, as here, there is clearly no contractual basis for doing so. The lower court's approach could effectively result in the imposition of class arbitration as a mandatory implied term in any bare agreement to arbitrate disputes, despite *Stolt-Nielsen*'s clear holding to the contrary. Businesses could be threatened with the risk of class arbitration as soon as they set pen down to paper to draft a boilerplate arbitration agreement, when in fact they never consented to or anticipated any such intractable and costly proceedings. "Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and . . . creates a scheme inconsistent with the FAA." *Concepcion*, 131 S. Ct. at 1748.

Moreover, the Third Circuit's decision could, as a practical matter, effectively permit the injection of class arbitration as an implied term in virtually *every* commercial arbitration agreement. This is so because the boilerplate "any dispute" arbitration clause at issue here is ubiquitous. "The 'any dispute' clause is a standard provision that may be found, in one form or another, in many arbitration agreements." *Reed* v. *Florida Metro. Univ.*, 681 F.3d at 642 (noting recurrence of "any dispute" clause in *Stolt-Nielsen*, 130 S. Ct. at 1765; and in *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 116 (2d Cir. 2011)). In fact, the American Arbitration Association and another prominent national arbitration association have endorsed this very "any dispute" language, or some close variant, as the industry standard for an effective general arbitration clause. *See Reed*, 681 F.3d at 642 (discussing American Arbitration Association, *Drafting Dispute Resolution Clauses: A Practical Guide*, p. 7 (Sept. 1, 2007), *available at* www.adr.org[4] (as visited January 28, 2013) (recommending "[a]ny controversy or claim arising out of or relating to this contract . . . shall be settled by arbitration . . . ."); JAMS *ADR Clauses*, *available at* http://www.jamsadr.com/clauses/#Standard (*JAMS Standard Arbitration Clause for Domestic Commercial Contracts*) (as visited January 28, 2013) (recommending "[a]ny dispute, claim or controversy arising out of or related to this Agreement . . . shall be determined by arbitration . . . .")). In short, class arbitration could become a common default term in arbitration agreements, notwithstanding *Stolt-Nielsen*'s clear holding to the contrary.

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[4] Search www.adr.org for "Drafting Dispute Resolution Clauses: A Practical Guide"; then follow hyperlink to first search result.

Finally, the Third Circuit's deference to an arbitral award that plainly violates the FAA's contractual basis requirement is entirely misplaced.[5] To be sure, the FAA may require judicial deference to an arbitrator's erroneous interpretation of a statute *other than* the FAA. "[A] court . . . will not set [the arbitral award] aside for error, either in law or fact." *Stolt-Nielsen*, 130 S. Ct. at 1780 (citation and internal quotation marks omitted). *See also Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008) (discussing same).

However, as this Court recently concluded, the FAA "cannot be held to destroy itself." *Concepcion*, 131 S. Ct. at 1748 (citation and internal quotation marks omitted). Here, the FAA cannot be interpreted to require judicial deference to an arbitral award that violates the FAA's core purposes by imposing class arbitration without the parties' mutual consent. The FAA is based on "the basic precept that arbitration is a matter of consent, not coercion . . . ." *Stolt-Nielsen*, 130 S. Ct. at 1773 (citation and internal quotation marks omitted). Moreover, the FAA envisions arbitration on an individual basis only, *Concepcion*, 131 S. Ct. at 1751-52, and requires a contractual basis to override this potent default term. *See Stolt-Nielsen*, 130 S. Ct. at 1775-76. The bare arbitration clause at issue here lacks any such contractual basis as a matter of law.

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[5] *See Sutter v. Oxford Health Plans*, 675 F. 3d at 224 (affirming, as not "totally irrational," arbitral award authorizing class arbitration based on generic "any dispute" arbitration clause).

See id. at 1775. Therefore, any arbitral or judicial decision to the contrary must be vacated under the FAA, to protect "[t]he overarching purpose of the FAA . . . to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Concepcion*, 131 S. Ct. at 1748.

In sum, the FAA does not, and cannot, require deference to an arbitral award that contravenes the FAA's core purposes by ordering class arbitration without the parties' mutual consent. And *Stolt-Nielsen* instructs that the naked arbitration clause at issue means that the parties did not consent to class arbitration.

CONCLUSION

For the reasons stated above, NELF respectfully requests that this Court reverse the judgment of the Third Circuit.

Respectfully submitted,

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BRIEF

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In the
Supreme Court of the United States

◆

OXFORD HEALTH PLANS LLC,

Petitioner,

v.

JOHN IVAN SUTTER, M.D.,

Respondent.

◆

On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

◆

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

◆

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QUESTION PRESENTED

In *Stolt-Nielsen v. AnimalFeeds International Corp.*, 130 S. Ct. 1758, 1776 (2010), this Court made clear that "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to arbitration." In this case, an arbitrator concluded that the parties affirmatively consented to class arbitration on the basis of a contract provision stating: "No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration." The question presented is:

Whether an arbitrator acts within his powers under the Federal Arbitration Act (as the Second and Third Circuits have held) or exceeds those powers (as the Fifth Circuit has held) by determining that parties affirmatively "agreed to authorize class arbitration," *Stolt-Nielsen*, 130 S. Ct. at 1776, based solely on their use of broad contractual language precluding litigation and requiring arbitration of any dispute arising under their contract.

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the Petitioner.[1]

PLF was founded 40 years ago and is widely recognized as one of the largest and most experienced nonprofit legal foundations of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. Among other things, PLF's Free Enterprise Project defends the freedom of contract, including the right of parties to agree by contract to the process for resolving disputes that might arise between them. To that end, PLF has participated as amicus curiae in many important cases involving the Federal Arbitration Act and contractual arbitration in general, including *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010); *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010); *Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008); and *Preston v. Ferrer*, 552 U.S. 346 (2008). PLF believes its public policy experience will assist this Court in its consideration of the merits of this case.

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

In *Stolt-Nielsen*, 130 S. Ct. at 1776, this Court held that the differences between individual arbitration and class arbitration are so great that arbitrators lack the power under the Federal Arbitration Act (FAA) to interpret parties' mere silence on the issue of class-action arbitration as constituting consent to resolve their disputes in class proceedings. Both sides to the dispute agreed that "silence," in that case, represented no meeting of the minds as to class arbitration. *Id.* at 1766. But silence could also mean that class arbitration simply was not considered by either side, leaving it to this Court to decide whether such a gap in a contract equals failure to consent to class arbitration, or whether silence allows the arbitrator to fill in the gap.

A key factor in deciding this question is that allowing arbitrators to impose class arbitration over the objection of a nonconsenting party would threaten important constitutional due process rights. A knowing and voluntary agreement to arbitrate waives certain constitutional rights that would apply in litigation. An arbitrator or court that infers an intent to arbitrate from equivocal evidence risks imposing a waiver of constitutional rights where the party did not so intend. This Court should not presume a waiver of constitutional rights via class arbitration absent an affirmatively stated waiver of those rights. The judiciary should "not stretch the language" of an arbitration agreement when the parties have omitted "a provision [they] easily might have [included]." *Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 183 (1959). Because class arbitration is fundamentally different than bilateral arbitration, implicating more significant due process concerns, the default rule should be that consent should not be inferred from silence. For these reasons, the decision below should be reversed.

ARGUMENT

I

FEDERAL COMMON LAW OF ARBITRATION BASED ON THE FAA CONTROLS INTERPRETATION OF ARBITRATION CONTRACTS WHERE IT CONFLICTS WITH STATE LAW

"The 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.'" *Concepcion*, 131 S. Ct. at 1748 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989)). "Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must 'give effect to the contractual rights and expectations of the parties.'" *Stolt-Nielsen*, 130 S. Ct. at 1773-74 (quoting *Volt*, 489 U.S. at 479).

In *Concepcion*, this Court emphasized that the FAA embodies a "liberal federal policy favoring arbitration," and that this policy extends only to individual arbitration, not class arbitrations. *Concepcion*, 131 S. Ct. at 1745, 1748 ("Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.").

The FAA incorporates this special solicitude for individual arbitration as a matter of substantive federal law, reflecting congressional favor for this form of alternative dispute resolution. *Preston v. Ferrer*, 552 U.S. at 349 ("The Act, which rests on Congress' authority under the Commerce Clause, supplies not simply a procedural framework applicable in federal courts; it also calls for the application, in state as well as federal courts, of federal substantive law regarding arbitration."). The FAA itself, however, does not attempt to micromanage arbitrations, leaving important details to arbitration organizations to develop through their own rules, which contracting parties can agree to use to resolve disputes.[2] *See* Kristen M. Blankley, *Class Actions Behind Closed Doors? How Consumer Claims Can (and Should) Be Resolved by Class-Action Arbitration*, 20 Ohio St. J. on Disp. Resol. 451, 452 (2005) (The FAA offers no guidance on the arbitration procedure itself, such as choosing an arbitrator, determining procedures, and providing for fees.).

Because the FAA itself does not address matters related to class arbitration, and parties may or may not choose to accept the rules of a particular arbitration organization, courts have developed substantive federal common law to fill those gaps in the statute. *See Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978) (the object of federal common law is to "fill[ ] a gap left by Congress' silence" with respect to a matter otherwise governed by a federal statute); *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 469 (1942) (Jackson, J., concurring) ("[W]herever we have occasion to decide a federal question which cannot be answered from federal statutes alone we may . . . resort to all of the source materials of the common law [and] when we have fashioned an answer it . . . become[s] a part of the federal non-statutory or common law."). State law cannot contradict this substantive federal common law. Thus, in *Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500, 503 (2012), this Court rejected a state's asserted interest in invalidating noncompete agreements, where that interest disfavored federally-protected arbitration contracts. *See also Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012) (chastising another state court for elevating state policy preferences above the federal substantive law of arbitration).

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[2] The American Arbitration Association developed rules for class arbitration in 2003, in response to this Court's decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003). *See* David S. Clancy & Matthew M. K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 Bus. Law. 55, 55 (2007).

Included within the substantive federal common law of arbitration is the rule announced in *Stolt-Nielsen*, requiring clear and unmistakable intent to authorize class arbitration. That requirement exists because the federal policy favoring arbitration cannot override the FAA's protections for the parties' freedom of contract. A court may submit to arbitration "only those disputes . . . the parties have agreed to submit." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). Policy considerations are no substitute for party agreement. *AT&T Techs., Inc. v. Communs. Workers of Am.*, 475 U.S. 643, 648-51 (1986). For example, in *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847, 2863 (2010), the Court considered whether an employer "implicitly" consented to arbitration when it sued to enforce a no-strike rule that turned on the date the collective bargaining agreement was ratified. The Court held that the filing of the lawsuit "[did] not establish an agreement, 'implicit' or otherwise, to arbitrate an issue (the CBA's formation date) that the company did not raise" and that the employer had consistently argued was beyond the scope of the arbitration clause. *See also Abram Landau Real Estate v. Benova*, 123 F.3d 69, 72 (2d Cir. 1997) (Where the parties contest the formation of an agreement, "any silence or ambiguity about whether such a question is arbitrable *reverses* the usual presumption that issues should be resolved in [arbitration's] favor.") (emphasis added).

II

CLASS ARBITRATION IMPLICATES SPECIAL DUE PROCESS CONCERNS AND THEREFORE REQUIRES AN EXPRESS, AFFIRMATIVE WAIVER OF THOSE RIGHTS

A. Class Arbitration Violates Due Process Rights of Absent Class Members

Parties to an arbitration contract have agreed to a process that is inherently individualistic, in contrast to class-based resolutions that resolve mass conflicts deemed similar enough to warrant collective treatment. The parties in a *class* proceeding therefore do not litigate the particular merits of their different circumstances. This raises the due process problem that class arbitration may not protect absent parties. *Concepcion*, 131 S. Ct. at 1751-52 ("[I]t is at the very least odd to think that an arbitrator would be entrusted with ensuring that third parties' due process rights are satisfied."); *Stolt-Nielsen*, 130 S. Ct. at 1776 ("The arbitrator's award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well.").

A person who signs an arbitration agreement with a business, but has no dispute with the firm at the time that a class arbitration is brought against it by another signer, could find herself barred from suing later if a dispute does arise which is similar to the dispute resolved in arbitration. This would deprive her entirely of the opportunity for individualized resolution to which she has a contractual right. Procedural rules applicable in class *litigation* typically require the parties to take steps to notify all potential class members of the proceedings and allow them to participate. Fed. R. Civ. P. 23. As Professor Wright explains,

> [i]n order to be deemed a party by representation, a class member must be represented in such a way that his rights are protected. Thus, an absent member of the class, even when he is specifically identified in the judgment, will not be bound if he can establish that to affect his rights would deprive him of property without due process of law, either because the class was inadequately represented or because of a failure to give him adequate notice.

Charles Alan Wright, et al., Federal Practice & Procedure: Federal Rules of Civil Procedure § 1789 (3d ed. 2004).

Due process requires that class members be adequately represented in a class proceeding because another person's judgment cannot bind a litigant who did not participate in the lawsuit. *Hansberry v. Lee*, 311 U.S. 32, 45 (1940). The due process rights of individuals are jeopardized when "it cannot be said that the procedure adopted fairly insures the protection of the interests of absent parties who are to be bound by it." *Id.* at 42 (citing *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 235 (1897)). Absent class members can be bound in abstentia only if "they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties." *Id.* at 42-43 (citing *Plumb v. Goodnow's Adm'r*, 123 U.S. 560, 561 (1887)).

The Seventh Circuit applied these principles to arbitration in *Exelon Generation Co., LLC v. Local 15, Int'l Brotherhood of Elec. Workers, AFL-CIO*, 540 F.3d 640 (7th Cir. 2008). In that case, a handful of retirees sought union representation in an arbitration to resolve an issue related to their medical benefits, and the question arose whether arbitral resolution of their claims could bind the retirees who were not otherwise covered by the collective bargaining agreement, and who had not individually agreed to representation by the union. *Id.* at 643. The court held that the union could represent the seven individual retirees who affirmatively sought to be bound by the arbitration, *id.* at 647, but that the arbitral decision would not bind any other retiree. *Id.* at 649 ("The arbitrator's decision would be final and binding on the parties to the arbitration. The CBA does not purport to bind non-parties to the arbitration, and for good reason. As a general rule, one is not bound by a judgment in an action in which he is not a party.") (citing *Hansberry*).

While federal statutes and rules set forth specific standards for notice in class litigation, there are no equivalent judicially-approved standards for what sort of notice requirements apply to class *arbitration*. In *Bazzle*, 539 U.S. at 453-54, this Court limited the judge's role solely to determining arbitrability, not supervising the arbitration to ensure that it complies with due process rules. Nondisputants who signed arbitration agreements have no guarantee that they are entitled to the same protections with respect to class arbitrations that they receive vis-á-vis class litigation. *See* Carole J. Buckner, *Due Process in Class Arbitration*, 58 Fla. L. Rev. 185, 251-52 (2006) ("[A]rbitration providers' rules also fail to require explicitly the arbitrator to protect or safeguard the rights of absent parties throughout the class action proceeding as explicitly required in class action litigation."). In the absence of the sorts of protections that apply in the judiciary, class arbitrations could deprive absent members of their right to sue, in violation of due process of law.

B. Absent Parties Have Individual Rights in an Arbitral Forum

1. Every Party Purported to Be Bound must Be Notified, but Such Notice Impacts Confidentiality Inherent in Arbitration

In class action litigation, every party is constitutionally entitled to notice of the proceeding. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). Due process requires that each potential plaintiff receive "notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel." *Id.* at 812. Notice must be "reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections," and must describe the litigation as well as the absent class members' right to participate. *Id.* Due process also requires "at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Id.*

These notice requirements, however, can run headlong into conflict with the parties' desire to maintain confidentiality in arbitral proceedings. Confidentiality is usually heralded as a principal advantage of choosing alternative dispute resolution procedures, including arbitration, over litigation. *Stolt-Nielsen*, 130 S. Ct. at 1776 ("[The] presumption of privacy and confidentiality" that normally is an essential component of bilateral arbitrations "doesn't apply in class arbitrations."); *Rosenberg v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 8 n.4 (1st Cir. 1999) (both sides in an employment dispute might desire confidentiality); *Iberia Credit Bureau, Inc. v. Cingular Wireless, LLC*, 379 F.3d 159, 175 (5th Cir. 2004) (same, in consumer context). Arbitration agreements frequently contain express confidentiality provisions or incorporate confidentiality by reference to specific arbitral rules. *See, e.g.*, *Parilla v. IAP Worldwide Servs. VI, Inc.*, 368 F.3d 269, 272 (3d Cir. 2004) (arbitration clause in employment contract incorporated confidentiality provision by reference to rules of American Arbitration Association). Confidentiality offers the parties freedom to disclose information in arbitration knowing that it will not be used against them in any subsequent proceeding. *See* Maureen A. Weston, *Checks on Participant Conduct in*

Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality, 76 Ind. L.J. 591, 594 (2001) (the promise of confidentiality encourages candor in discussions and presentations of evidence).

Broad confidentiality provisions typical of individual arbitration proceedings would preclude the most common type of notice: publication in newspapers of general circulation. For example, the notice given in *Phillips Petroleum Co. v. Shutts* described the proceedings, named the representatives and their counsel, and offered the ability to opt out of the litigation in order to pursue a different claim against the same defendants. 472 U.S. at 812-13. Parties who prefer arbitration because it will avoid publicity would find their intentions thwarted if absent class members are alerted through the media. *See* Edward C. Anderson & Kirk D. Knutson, *"Class" Arbitration? What About the Rights of Absent "Class" Members?*, 7 Engage 148, 151 (2006)[3] (The confidentiality of arbitration is at odds with the public nature of the Rule 23 "opt-out" procedure, which, in part, relies on mass media to disseminate notice to absent class members.).[4]

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[3] *Available at* http://www.fed-soc.org/doclib/20080214_LitAnderson.pdf (last visited Jan. 15, 2013).

[4] Both the AAA and JAMS class action procedures adopted after *Bazzle* include rules for publication of notice and arbitral awards. See Am. Arbitration Ass'n, AAA Supplementary Rules for Class Arbitrations (2003), *available at* http://www.jamsadr.com/rules-class-action-procedures/ (last visited Jan. 16, 2013); JAMS, Class Action Procedures (2005) (last visited Jan. 16, 2013); http://www.jamsadr.com/rules-class-action-procedures/ (last visited Jan. 16, 2013.) These rules borrow heavily from Federal

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2. Each Party to an Arbitration Is Entitled to Make Key Decisions

Each party to an arbitration has a right to participate in choosing the arbitrator—a right the Seventh Circuit calls "the cornerstone of the arbitral process." *Lefkovitz v. Wagner*, 395 F.3d 773, 780 (7th Cir.), *cert. denied*, 546 U.S. 812 (2005). Also, in some cases, parties to an arbitration agreement are legally entitled to invalidate that agreement, based on individualized evidence arbitration is too expensive. *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 (7th Cir. 2003).[5] Moreover, arbitrators are under no compulsion to develop or follow precedent. *See* Richard M. Alderman, *Consumer Arbitration: The Destruction of the Common Law*, 2 J. Am. Arb. 1, 11

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[4] (...continued)
Rule of Civil Procedure 23. *See* W. Mark Weidemaier, *Arbitration and the Individuation Critique*, 49 Ariz. L. Rev. 69, 94 (2007) (noting that the AAA class arbitration rules "largely imitate federal class action practice").

[5] Arbitrators and the parties can also agree to many other facets of the process. They are not bound to an existing courthouse, but may choose any suitable location. There are no public dockets to notify interested parties or the media of the dispute, and the public is not permitted to attend arbitral hearings. Arbitrators may limit the scope of discovery, and if discovery is permitted, the parties may agree to restrict its use to only the arbitration proceedings. Laurie Kratky Dore, *Secrecy in Litigation: Article: Public Courts Versus Private Justice: It's Time to Let Some Sun Shine in on Alternative Dispute Resolution*, 81 Chi.-Kent L. Rev. 463, 484-85 (2006). Arbitration rules typically prohibit parties from sharing evidence, testimony, briefs, motions, and other information disclosed during the proceeding. *See, e.g.*, *Ting v. AT&T*, 319 F.3d 1126, 1151 n.16 (9th Cir.), *cert. denied*, 540 U.S. 811 (2003) (agreement prohibited disclosure of the contents of arbitration).

(2003) ("Unlike court opinions, which are published, most decisions of arbitrators are kept secret, often not even accompanied by a written opinion. Even when published . . ., the decision of one arbitrator, or a panel of arbitrators, is in no way binding on any other . . . ."). They may also rely on equity rather than the law to award punitive damages, attorneys' fees, or injunctive relief. Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 Ohio St. J. on Disp. Resol. 19, 37 (1999). These factors reveal that arbitration is an essentially individualized format, in which each party has reserved an opportunity for individual determination of his or her particular injury. *See, e.g.*, Thomas Burch, *Necessity Never Made a Good Bargain: When Consumer Arbitration Agreements Prohibit Class Relief*, 31 Fla. St. U. L. Rev. 1005, 1031 (2004) (AAA rules "place all the procedural responsibilities in the hands of the parties and the arbitrator."). Class treatment would deprive the parties of this individualized treatment.

This Court has identified several advantages to individual arbitration, including the general informality and expedited nature of arbitration in comparison to litigation. *Concepcion*, 131 S. Ct. at 1749. But *class* arbitration raises significant issues regarding how the arbitrator and representative complainants would handle such matters as the number of witnesses called, or the timing and extent of discovery, and whether their decisions on those matters affects the rights of absent parties. *See* Linsday R. Androski, *A Contested Merger: The Intersection of Class Actions and Mandatory Arbitration Clauses*, 2003 U. Chi. Legal F. 631, 649

(Class procedure "subjects arbitration to the very judicial burden that the contracting parties sought to avoid through arbitration."). Arbitrators have the power to limit the number of witnesses called or the time allotted for discovery. *See* Jason F. Darnall & Richard Bales, *Arbitral Discovery of Non-Parties*, 2001 J. Disp. Resol. 321, 335-36 (favoring arbitrator discretion to determine what discovery is necessary and relevant in a given case); Wendy Ho, *Discovery in Commercial Arbitration Proceedings*, 34 Hous. L. Rev. 199, 218-19 (1997) (there are few rules regarding arbitrators and discovery, so each arbitrator sets his or her own rules in each arbitration). In this respect, absent class members may not be adequately represented by the named parties if the named parties lack sufficient time or resources to present a compelling case. Blankley, *supra*, at 472-73.

3. Arbitrators May Be Unable to Discern and Accommodate Due Process Rights in Complex Class Arbitration

There are no requirements on who can or cannot be an arbitrator. Nicole Buonocore, *Resurrecting a Dead Horse—Arbitrator Certification as a Means to Achieve Diversity*, 76 U. Det. Mercy L. Rev. 483, 484 (1999) ("Arbitration is often called a 'profession.' Yet none of the traditional characteristics associated with a profession, such as schooling in a particular field, testing, and licensing, apply to the arbitration profession."). Many arbitrators, especially those specializing in labor and employment disputes, are not lawyers, meaning that while they may have the knowledge advantageous to deciding complicated matters within their expertise, they have no particular proficiency in constitutional matters. *See, e.g.*, Shalu Tandon Buckley, Note, *Practical Concerns Regarding the Arbitration of Statutory Employment Claims: Questions that Remain Unanswered After Gilmer and Some Suggested Answers*, 11 Ohio St. J. on Disp. Resol. 149, 174 (1996) (many highly qualified arbitrators are not members of the bar, but they are keen minds with experience in the labor and employment industry).

Even if chosen arbitrators are familiar with constitutional law, they are under no compulsion to apply that law—on either procedural or substantive matters—consistent with judicial precedents. Murray S. Levin, *The Role of Substantive Law in Business Arbitration and the Importance of Volition*, 35 Am. Bus. L.J. 105, 118 (1997) (observing that arbitration organizations such as the AAA do not emphasize the role of substantive law and often encourage arbitrators to craft awards based on equity); Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 Minn. L. Rev. 703, 719-20 (1999) (stating that up to 90% of arbitrators would disregard the law in order to reach an equitable result in a case).

In addition, due process rights in a class action may require complicated case management techniques such as the creation and separate adjudication of subclasses, or trials specific to individual class members on some or all issues. For example, in *Cimino v. Raymark Industries, Inc.*, 151 F.3d 297, 315-16 (5th Cir. 1998), the Fifth Circuit Court of Appeals reversed a class-action judgment in an asbestos case because the district court's class action trial plan was not sufficiently individualized. The court held that while class actions are intended to promote efficiency, the trial plan improperly glossed over person-by-person variances in a way that adversely affected the defendant's right to a jury determination of the "distinct and separable issues of the actual damages of each of the extrapolation plaintiffs." *Id.* at 320-21.

These are serious considerations that any party would want to consider prior to engaging in binding arbitration. Allowing an arbitrator, even based on state law principles, to sweep hundreds or thousands of people into a class arbitration where the arbitration contract makes no mention of such a procedure, means that there are unwilling participants on both sides of the dispute—the company that never contemplated and consented to class arbitration and absent individuals who may share a grievance—a direct contradiction to the ultimate purpose of federally-protected arbitration. That purpose is to promote the freedom of choice that lies at the heart of freedom of contract.

III

FUNDAMENTAL DUE PROCESS RIGHTS MAY NOT BE WAIVED BY SILENCE

Under the Constitution, certain "fundamental" or "basic" rights cannot be waived unless a defendant personally participates in the waiver. *See, e.g., Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988); *United States v. Olano*, 507 U.S. 725, 733 (1993). "[E]very reasonable presumption should be indulged against . . . waiver" of a constitutional right. *Hodges v. Easton*, 106 U.S. 408, 412 (1882).[6] Due process rights fall within this category,[7] and due process implications abound when binding nondisputants to judgments in class arbitrations. *See, e.g.*, Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 Wm. & Mary L. Rev. 1711, 1722 (2006) ("An arbitral award generally cannot bind a nonparty to the arbitration contract; however, the question of whether nonparticipatory class members' rights may be foreclosed in a private class arbitration is not entirely clear.").

This Court has repeatedly held that it will not lightly presume in favor of a waiver of constitutional rights. *See, e.g.*, *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999); *Aetna Ins. Co. v. Kennedy to Use of Bogash*, 301 U.S. 389, 393 (1937). Yet arbitration agreements obviously waive certain constitutional protections. *See, e.g.*, *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d

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[6] The vast majority of cases concerning waiver of constitutional rights deal with criminal proceedings wherein the courts repeatedly stress that there must be "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Brady v. United States*, 397 U.S. 742, 748 (1970); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

[7] The requirement of an express waiver of rights also arises in the context of certain statutes intended to protect individual rights. *See e.g.*, *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) ("[W]e will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.'"); *PPG Industries, Inc. v. Guardian Industries Corp.*, 597 F.2d 1090, 1093 (6th Cir.), *cert. denied*, 444 U.S. 930 (1979) ("It has long been held by federal courts that agreements granting patent licenses are personal and not assignable unless expressly made so.")

704, 709 (7th Cir. 1994) ("[S]hort of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract."). Thus, inferring that a party is willing to participate in class arbitration when the arbitration agreement is silent on that matter might operate to waive constitutional procedural rights, both of the defendant and those nondisputants who have also signed the arbitration agreement. This Court should resist adopting a rule that could lead to such dangerous consequences.

Stolt-Nielsen, 130 S. Ct. at 1776, held that "the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." The Court identified four reasons why class arbitration was not fairly encompassed in a contract that expressly provided only for individual arbitration: (1) the large number of disputes commonly embraced in class arbitration, (2) the lack of privacy and confidentiality that class arbitration would entail, (3) the impact on absent class members, and (4) the high commercial stakes. *Id.* For these reasons, "the Court found class arbitration to be more than merely distinctive from arbitration generally; it found class arbitration to be virtually antithetical to it." George A. Bermann, *The Supreme Court Trilogy and Its Impact on U.S. Arbitration Law*, 22 Am. Rev. Int'l Arb. 551, 560 (2011).

The Federal Arbitration Act was designed to expand and enforce freedom of choice. Adopting a rule that might imply the waiver of important constitutional rights would undermine the purpose of the Act by replacing informed consent with implication and coercion. It would replace a regime of free decisionmaking with a rule that enforces "consent" where none actually exists.

> [A]n arbitration contract that says nothing about class arbitration should be deemed an agreement to the kind of arbitration that has prevailed since the FAA's enactment, *i.e.*, an individual, non-class arbitration—not an agreement to a new and unusual form of arbitration that the parties almost certainly did not contemplate.

Clancy & Stein, *An Uninvited Guest*, 63 Bus. Law. at 65 n.46 (basing their conclusion upon a review of the legislative history resulting in passage of the FAA in 1925).

Decades of individual arbitration has given rise to a general understanding that parties trade the formal due process in a court setting for the procedural shortcuts (*e.g.*, limited discovery and relaxed evidentiary standards) that are the essence of arbitration. For example, the Ninth Circuit upheld a arbitrator's million dollar punitive damages award in *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1063-64 (9th Cir. 1991), over Cunard's assertion that the arbitration violated due process because of its lack of evidentiary rules. *Id.* at 1063. The court rejected that argument because Cunard "[took] advantage of this process, into which it entered voluntarily," *id.* at 1063-64, and "parties enter into arbitration by contract, rather than through a statutory scheme imposed involuntarily." *Id.* To defend freedom of choice and to put into effect the actual decisions of contracting parties, this Court should refuse to infer a willingness to participate in class arbitration absent affirmative, express consent.

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CONCLUSION

Arbitration "is a matter of consent, not coercion." *Volt*, 489 U.S. at 479. Divining intent from silence substitutes "telepathy" for interpretation. *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 211 (1991) (O'Connor, J., dissenting). The fundamental differences between class arbitration and traditional, individual arbitration are such that consent must be manifest as an affirmative agreement, not implied by silence.

For the reasons stated above, the decision below should be reversed.

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Respectfully submitted,

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